Supreme Court, U.S.
FILED
MAY 14 1993
OFFICE OF THE CLERK

92-1823

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LORRAINE JOHNSON, as Special Administratrix of the Estate of GORDON JOHNSON, Deceased,

Petitioner,

v.

OLLIE BELLE ROSS, Individually, and JESSE ROSS, Representative of the Estate of WILLIAM ROSS, Deceased,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL PLAYFAIR FIELD
Counsel of Record
204 North West Street
Waukegan, Illinois 60085
(708) 662-5800
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

63 pp

QUESTIONS PRESENTED

I. Does the reversal of a prior District Court final judgment that the allegations of a Plaintiff's Complaint standing alone, are insufficient to overcome a plea of qualified immunity in an action brought pursuant to 42 USC, Sec. 1983 by a United States Circuit Court of Appeals in an appeal brought by the Plaintiff against whom judgment was entered divest a United States Court of Appeals of jurisdiction to hear the first interlocutory appeal by the Defendant of a District Court Order denying a Motion for Summary Judgment solely as a matter of law on a fully developed record after the close of discovery after remand on the issue of qualified immunity?

II. Does a holding by a United States Circuit Court of Appeals that the well pled allegations of a Plaintiff's Complaint brought pursuant to 42 USC, Sec. 1983, taken as true and standing alone, are sufficient to set forth a violation of clearly established law which reverses a District Court's final judgment in favor of a Defendant preclude that Defendant from asserting the defense of qualified immunity upon remand and moving for Summary Judgment on that basis in the District Court at the close of discovery?

III. Does a public officer who, in responding to a location where an individual has been submerged in Lake Michigan for a period of time in excess of that which he was taught could be survived, prevents two sport scuba divers and other individuals from jumping from a nearby boat or the end of a breakwater respectively into the water to attempt a rescue or recovery of the submerged individual in favor of public safety divers who are in route to the scene out of concern for the safety of the would be rescuers violate law which was clearly established in August, 1985?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.[1]

[1] Additionally, the United States of America, County of Lake, Robert H. Babcox, in his official capacity as Sheriff of Lake County, Clinton O. Grinnell, in his official capacity as Sheriff of Lake County, City of Waukegan, Waukegan Firefighters and Paramedics, Waukegan Life Guards, Waukegan Port District and Waukegan Park District were all named as additional Defendants in the District Court. None are parties to this proceeding or to that of which review is sought.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I.	
THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO PRETRIAL APPELLATE JURISDICTION TO REVIEW DENIALS OF CLAIMS OF IMMUNITY	8
II.	
THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT	12
III.	
THIS CASE PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW WHICH HAS NOT BUT SHOULD BE SETTLED BY THIS COURT	14
CONCLUSION	16

APPENDIX

	App. Page
Order of the United States Court of Appeals for the Seventh Circuit, dismissing Appeal, February 26, 1993	1
Report and Recommendation of Magistrate, District Court September 2, 1987	2
Order of District Court, adopting Magistrate's Report recommending grant of Summary Judgment to Gordon Johnson in his individual capacity, October 15, 1987	6
Order of District Court, dismissing all Plaintiff's Federal claims against all remaining parties, August 29, 1988	7
Order of District Court, dismissing remainder of Plaintiff's case in its entirety, August 24, 1989	8
Judgment entered in District Court, August 24, 1989	9
Opinion of the United States Court of Appeals for the Seventh Circuit, August 16, 1990	10
Judgment of the United States Court of Appeals for the Seventh Circuit, August 16, 1990	31
Order of the United States District Court, Northern District of Illinois, Eastern Division, December 3, 1992	33
Order for the United States Court of Appeals for the Seventh Circuit, denying rehearing, April 5, 1993	34
Order of the United States Court of Appeals for the Seventh Circuit, October 10, 1990	36
Notice of Appeal, December 4, 1992	38
Order of the United States Court of Appeals for the Seventh Circuit, staying Mandate, April 15, 1993	39

TABLE OF AUTHORITIES

Cases	PAGE
Abel v. Miller, 904 F.2d 394 (7th Cir., 1990)	9
Anderson v. Creighton, 483 U.S. 635 (1987)	13
Andrews v. Wilkins, 934 F.2d 1267 (D.C. Cir., 1991)	14
Butts v. Economou, 438 U.S. 478 (1978)	13
Cohen v. Beneficial Industrial Loan Corporation, 337 U.S. 541 (1949)	8, 9, 13
Cruzan v. Director, Missouri Department of Health, 497 U.S. 261 (1990)	15
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989)	15
Federal Power Commission v. Pacific Power & Light Company, 307 U.S. 156 (1939)	13
Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40 (1st Cir., 1988)	11
Fernandez v. Leonard, 784 F.2d 1209 (1st Cir., 1986)	11
Forsythe v. Kleindeinst, 599 F.2d 1203 (3rd Cir., 1979)	10
Forsythe v. Kleindeinst, 729 F.2d 267 (3rd Cir., 1984)	10
Fry v. Melaragno, 939 F.2d 832 (9th Cir., 1991) ..	11
Guerico v. Brody, 814 F.2d 1115 (6th Cir., 1987) .	10
Guerico v. Brody, 911 F.2d 1179 (6th Cir., 1990) cert. denied ____ U.S. ____, 111 S.Ct. 1681 (1991)	10
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	12, 13

Hunter v. Bryant, 502 U.S. ____, 112 S.Ct. 534 (1991) 13

Kaiter v. Town of Boxford, 836 F.2d 704 (1st Cir., 1988) 11

Kennedy v. City of Cleveland, 797 F.2d 297 (6th Cir., 1986) cert. denied sub nom. 479 U.S. 1103 (1987) 10

Kline v. Burke Construction Company, 260 U.S. 226 (1922) 14

Kulwicki v. Dawson, 969 F.2d 1454 (3rd Cir., 1992) 10

Malley v. Briggs, 475 U.S. 335 (1986) 15

Mitchell v. Forsythe, 472 U.S. 511 (1985) ..... *passim*

Murphy v. Morris, 849 F.2d 1101 (8th Cir., 1988) . 11

Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir., 1992) 11

Ross v. United States, 910 F.2d 1422 (7th Cir., 1990) 7

Salas v. Carpenter, 980 F.2d 299 (5th Cir., 1992) . 15

Unwin v. Campbell, 863 F.2d 124 (1st Cir., 1988) . 11

Willy v. Coastal Corporation, 503 U.S. ____, 112 S.Ct. 1076 (1992) 13

Other Authorities

42 USC, Sec. 1983 ..... *passim*

28 USC, Sec. 1291 ..... 3, 8, 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LORRAINE JOHNSON, as Special Administratrix of the Estate of GORDON JOHNSON, Deceased,

Petitioner,

v.

OLLIE BELLE ROSS, Individually, and JESSE ROSS, Representative of the Estate of WILLIAM ROSS, Deceased,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the Court of Appeals dismissing Petitioner's Appeal was entered on February 26, 1993, is unreported and is reprinted at page one of the Appendix to this Petition.

The Order of the Court of Appeals setting forth the reason for its dismissal of the appeal on denial of rehearing was entered on April 5, 1993, is unreported and is reprinted at page thirty-four of the Appendix to this Petition.

The Report and Recommendation of the Magistrate that Petitioner's original Motion for Summary Judgment on the basis of qualified immunity be granted was entered on September 2, 1987, is unreported and is printed at page two of the Appendix to this Petition.

The prior opinion of the Court of Appeals reversing the grant of judgment in favor of Petitioner on the basis of qualified immunity and remanding for further proceedings is reported at 910 F.2d 1422 and is reprinted at page ten of the Appendix to this Petition.

JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction pursuant to 28 USC, Sec. 1254(1). The United States Court of Appeals for the Seventh Circuit issued its Order dismissing Petitioner's Appeal in that Court on February 26, 1993. The Court of Appeals denied Petitioner's timely filed Petition for Rehearing on April 5, 1993. The Petition for a Writ of Certiorari was filed within ninety days of the denial of the Petition for Rehearing in the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, Sec. 1983:
Civil Action for Deprivation of Rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an actions at law, suit in equity, or other proper proceeding

for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

United States Code, Title 28, Sec. 1291:
Final Decisions of District Courts:

The Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this Title.

STATEMENT OF THE CASE

I.

THE FACTUAL BACKGROUND[2]

On August 11, 1985, between 6:05 p.m. and 6:10 p.m., twelve year old William Ross slipped on a slanting, broken piece of concrete at the end of a breakwater which extended approximately one-third of a mile into the open water of Lake Michigan, struck his head, fell into the water and shortly thereafter sank beneath the surface of the lake. His friend ran back to the beach area and ad-

[2] The facts recited are as set forth in the Defendant's Statement of Undisputed Facts which was filed in the District Court as required by General Rule 12(m) of that Court to which the Respondents agreed in the Response to that Statement they filed in the District Court as required by Rule 12(n) of the District Court.

vised a lifeguard of the incident. Some lifeguards as well as on and off duty firefighters and police officers of the City of Waukegan who were attending a lake front festival at the beach responded to the end of the breakwater.

Gordon Johnson and his partner Albert Frank were deputies with the Lake County Sheriff's Marine Patrol Unit. An Intergovernmental Agreement between the City and the County provided the Sheriff had jurisdiction for police services on the lake and the City was to provide rescue services on the shoreline and the breakwaters.

Johnson and his partner were beginning their dinner when advised of the Ross submersion at 6:14 p.m. They immediately ran to their boat and arrived at the end of the breakwater at some time subsequent to 6:18 p.m. Neither the deputies nor anyone on the breakwater could see Ross' body in the water. The deputies had been trained that an individual will die if submerged for five minutes.

A Waukegan Fire Department Rescue Squad with two members of the department's dive team aboard responded to the incident at 6:16 p.m. Johnson knew fire department divers were on the way from communications with the people at the end of the breakwater. The Rescue Squad arrived at the shore end of the breakwater at 6:20 p.m. Diver Robert Clare then began to prepare for a dive to retrieve Ross.

Large rocks or riprap lined the breakwater at and beneath the water's surface. The wind that day was out of the northeast at ten knots causing waves to break against the end of the breakwater.

While Johnson was off the end of the breakwater, he ordered a life guard and firefighter not to attempt free dives off of the structure into the lake. Shortly thereafter, a boat with two civilian sport divers arrived off the end

of the breakwater. Johnson asked if they were members of either the City or County dive team. When told that they were not, he ordered them out of the area stating he could not be liable for harm to them should they enter the water. After a brief protest, the sport divers retreated.

Firefighter-diver Clare retrieved Ross from some rocks in fifteen to twenty feet of water and brought him to the surface. Johnson transported Ross, who was unconscious, to the awaiting rescue squad. Ross was taken to a local hospital and pronounced dead the next morning.

In addition to his duties as a deputy, Johnson also served on a local fire department in the County and was a member of that department's dive team as well as a regional organization of public safety divers from local fire departments. In August of 1985, this organization had rules in place which provided that only member divers were to participate in rescue and recovery dives for safety reasons.

Those who were present at the end of the breakwater had different views of the danger presented to would be rescuers from slight to substantial. They also voiced different opinions of the propriety of Johnson's conduct from disapproval to approval. All agreed that safety of would be rescuers should be a relevant concern. The firefighter told by Johnson not to dive, who was the most critical of Johnson's conduct, agreed that he would not allow civilians to enter burning buildings to retrieve individuals known to be therein.

II.

THE PROCEEDINGS IN THE COURTS BELOW

Respondent, Ollie Belle Ross, filed suit in the U.S. District Court against Gordon Johnson both individually and in his official capacity as a Deputy Sheriff, Robert

H. Babcox, The Sheriff of Lake County in his official capacity only, the County of Lake, the City of Waukegan and various administrative subgroups including the fire department and life guards, the Waukegan Port District and the Waukegan Park District alleging purported violations of 42 USC, Sec. 1983 and of Illinois law in conjunction with the drowning death of her son, William Ross. The District Court had jurisdiction pursuant to 28 USC, Sec. 1331, 1343(a)(3). The Plaintiff also named the United States of America as a Defendant pursuant to the Federal Tort Claims Act, 28 USC, Sec. 2671, et seq. for negligence in the maintenance of a breakwater extending into Lake Michigan from which her son fell. The Plaintiff voluntarily dismissed the Waukegan Port District and the Waukegan Park District from the litigation. Thereafter, each Defendant moved to dismiss the allegations of Plaintiff's Complaint. Johnson's Motion was styled one for Summary Judgment although no Affidavits or other evidentiary material were attached to it and it simply alleged that the allegations of Plaintiff's Complaint did not set forth a violation of law which was clearly established at the time he acted. On September 2, 1987, Magistrate Judge Elaine Bucklo entered her report and recommendation that Defendant Gordon Johnson's Motion for Summary Judgment be allowed (App. 2). Thereafter, the Plaintiff filed timely objections to the report and recommendation of the Magistrate.

On October 15, 1987, the District Court adopted the Magistrate's recommendation that Summary Judgment be granted in favor of Gordon Johnson on the basis of qualified immunity (App. 6).

On August 29, 1988, the District Court entered its Order dismissing all remaining claims brought pursuant to USC, Sec. 1983 and the Federal Tort Claims Act against

all remaining Defendants (App. 7). On August 24, 1989, the District Court denied Plaintiff's Motion for leave to file a second Amended Complaint against the United States and declined to retain pendent jurisdiction over the remaining State claims and dismissed the case in its entirety (App. 8). The Plaintiff, thereafter, filed a timely appeal in the United States Court of Appeals for the Seventh Circuit.

On August 16, 1990, the Court of Appeals reversed the District Court Order granting Summary Judgment to Johnson on the basis of qualified immunity and the Order dismissing the claims against the County of Lake and the Sheriff. The Court affirmed the dismissal of all other claims against all other Defendants (App. 10, 31). Gordon Johnson subsequently died. On December 18, 1990, the District Court entered its Order substituting Petitioner, Lorraine Johnson, the widow of Gordon Johnson, as a party defendant solely in her capacity as the Special Administratrix for the Estate of Gordon Johnson, Deceased. The District Court ordered that all discovery in the case be completed by August 31, 1992. On September 18, 1992, Petitioner Johnson filed her Motion for Summary Judgment on the basis of qualified immunity and supporting memoranda and documentation.

Thereafter, on December 3, 1992, the District Court entered its Order which, in its entirety, read as follows:

> "Defendant Lorraine Johnson's Motion for Summary Judgment is denied. The qualified immunity issue Defendant Johnson attempts to raise is precluded by the Seventh Circuit's prior decision in this case, *Ross v. United States*, 910 F.2d 1422 (7th Cir., 1990)." (App. 33)

On December 4, 1992, Petitioner filed her Notice of Appeal (App. 38). Respondent thereafter moved to dismiss

the appeal arguing that the Seventh Circuit's prior opinion constituted the law of the case on the issue of qualified immunity or alternatively that the reasonableness of Johnson's conduct was a question of fact. Thereafter, on February 26, 1993, the Court of Appeals entered its Order dismissing the Appeal for want of jurisdiction (App. 1). On March 12, 1993, Petitioner timely filed a Petition for Rehearing on the issue of jurisdiction and said Petition was denied in the Court's Order of April 5, 1993 (App. 34). Thereafter, on April 12, 1993, Petitioner moved to stay the issuance of the mandate which Motion was granted on April 15, 1993 (App. 39).

A Motion for Summary Judgment filed by the County of Lake and the Sheriff of Lake County in his official capacity is now pending in the District Court.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO PRETRIAL APPELLATE JURISDICTION TO REVIEW DENIALS OF CLAIMS OF IMMUNITY.

Section 1291 of Title 28 provides that the Circuit Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States. This grant of jurisdiction extends to that small class of orders which determine with finality claims of right separable from and collateral to rights asserted in the action which are too important to be denied review and too independent of the cause itself to require that Appellate consideration be deferred until the case is adjudicated, *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541,

546 (1949). A District Court's denial of a claim of qualified immunity in a case brought pursuant to 42 USC, Sec., 1983 in the form either of a denial of a Defendant's Motion to Dismiss or denial of Summary Judgment as a matter of law easily meets these requirements, *Mitchell v. Forsythe*, 472 U.S. 511, 527 (1985).

The Court of Appeals for the Seventh Circuit has held that under *Mitchell* there can be but one pretrial appeal on any issue of immunity, *Abel v. Miller*, 904 F.2d 394, 396 (7th Cir., 1990). Though describing Petitioner's arguments to the contrary as "novel", the Order denying rehearing in the case below makes it clear that the Circuit's one pretrial appeal on immunity rule applies not just to successive appeals by defendants but even in situations where the first appeal has been brought by a Plaintiff following a District Court determination that the allegations of the Complaint, standing alone, are insufficient to set forth a violation of clearly established law (App. 34). A Plaintiff who, on appeal, obtains a reversal of such a ruling has effectively barred any Defendant in the Seventh Circuit from seeking any pretrial review of a subsequent denial of immunity claimed on the developed record in that case. Such a result is unfair and likely to be repeated in the future. Implicit in the Seventh Circuit's rule allowing but one pretrial appeal is that it applies to both claims of absolute and qualified immunity as well as denials of Motions to Dismiss and for Summary Judgment. Petitioner is unaware of any rulings in any other Circuit which so restrict Appellate jurisdiction. Presently, a Defendant's rights to pretrial appeals on the issue of immunity are notably different depending upon the Circuit in which he is tried.

A review of the cases reveals that the state of the law in this area is incoherent. In the Sixth Circuit, a different result would obtain from that which occurred in this case.

The holding in *Mitchell* is there interpreted as permitting two pretrial appeals on immunity grounds, the first following denial of a Motion to Dismiss and the second following denial of a Motion for Summary Judgment, *Kennedy v. City of Cleveland*, 797 F.2d 297, 299 (6th Cir., 1986), cert. denied, sub nom. 479 U.S. 1103 (1987).

In a situation which does not substantially differ from that herein, that Circuit accepted jurisdiction to hear a second pretrial appeal of an Order which denied a Motion to Dismiss based upon a claim of qualified immunity, *Guerico v. Brody*, 911 F.2d 1179 (6th Cir., 1990) cert. denied, ____ U.S. ____, 111 S. Ct. 1681 (1991). This jurisdiction existed despite the fact that the Order was entered on remand after a prior appeal which reversed a District Court Order granting the Defendant's Motion to Dismiss on the basis of absolute immunity, *Guerico v. Brody*, 814 F.2d 1115 (6th Cir., 1987).

The Third Circuit also recognizes that its jurisdiction is not limited to one pretrial appeal on the issue of immunity by stating that "the (Supreme) Court did not distinguish for purposes of appealability between Motions to Dismiss and Motions for Summary Judgment. However, it is generally understood that *Mitchell* contemplates appeals from denials of immunity at either or both of these stages in civil rights proceedings" (citations omitted), *Kulwicki v. Dawson*, 969 F.2d 1454, 1460 n. 5 (3rd Cir., 1992).

The Third Circuit, in fact, found it had Appellate jurisdiction for not one but rather two pretrial appeals on the issue of absolute immunity in *Mitchell* itself, see, *Forsythe v. Kleindeinst*, 599 F.2d 1203 (3rd Cir., 1979); *Forsythe v. Kleindeinst*, 729 F.2d 267 (3rd Cir., 1984). Under the Seventh Circuit's rule in *Abel*, both the Third Circuit and this Court as well would have been without jurisdiction

to hear the second appeal of the former Attorney General's denial of absolute and qualified immunity because no trial had yet taken place.

The Eighth Circuit also differs from the Seventh in that it would allow separate successive pretrial appeals on the issues of absolute and qualified immunity, *Murphy v. Morris*, 849 F.2d 1101, 1104 (8th Cir., 1988).

The Ninth Circuit has split on the issue. One panel has held that separate pretrial appeals may be taken from both denials of a Motion to Dismiss and one for Summary Judgment, *Fry v. Melaragno*, 939 F.2d 832, 835 n.5 (9th Cir., 1991). A separate panel has stated that a Defendant is limited to but one pretrial appeal on all immunity issues, *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 870-71 (9th Cir., 1992).

The First Circuit has also ruled that Defendants who raise claims of immunity are limited to one pretrial appeal and may appeal only once from adverse rulings first on the pleadings and then on the facts as produced after discovery, *Fernandez v. Leonard*, 784 F.2d 1209, 1214 n. 2 (1st Cir., 1986); see also *Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 48 n. 8 (1st Cir., 1988); *Unwin v. Campbell*, 863 F.2d 124, 132 n. 5 (1st Cir., 1988). Additionally, that Circuit has also found that there can be but one appeal when both the issues of absolute and qualified immunity are raised by a Defendant, *Kaiter v. Town of Boxford*, 836 F.2d 704, 708 (1st Cir., 1988). The Eighth Circuit expressly rejected the *Kaiter* rationale in *Murphy*, 849 F.2d at 1004 finding that the policy considerations underlying immunity from suit are best served by allowing successive appeals.

Petitioner notes that the Ninth Circuit decision in *Pelletier* and each of the First Circuit decisions cited above deal expressly with the question of multiple appeals

brought by Defendants who unsuccessfully assert immunity defenses. To her knowledge, no Circuit other than the Seventh has restricted the concept of jurisdiction under *Mitchell* to such a point that it precludes a Defendant from taking its first and only pretrial appeal from a denial of a Motion for Summary Judgment on a fully developed record where a Plaintiff has successfully appealed from an earlier final order and judgment finding that the well pled allegations of the Complaint considered alone and in a light most favorable to the Plaintiff are insufficient to set forth a violation of clearly established law. Such a rule is in conflict with every other Circuit.

The conflicting decisions on the breadth of jurisdiction of the various Courts of Appeals can only be effectively resolved by prompt action of this Court. The issue is one of national importance given the strong public policy as stated by this Court that both economy and logic dictate that where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken with independence and without fear of consequences, *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

II.

THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY WHICH CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

This Court stated in *Mitchell* that a denial of a claim of qualified immunity by the District Court is a final Order under the Collateral Order Doctrine, 472 U.S. at 526-27. This Court then stated without qualification or limitation that "the denial of a Defendant's Motion for Dismissal or Summary Judgment on the ground of quali-

fied immunity easily meets these requirements", 472 U.S. at 527. It follows that either type of Order is a "final" Order and thus appealable under the Collateral Order Doctrine.

This Court has long held that unless a Complaint brought pursuant to 42 USC, Sec., 1983 states a compensable claim for relief under the Federal Constitution, it should not survive a Motion to Dismiss, *Butts v. Economou*, 438 U.S. 478, 507-08 (1978). To withstand such Motion, the Plaintiff's allegations must state a claim for a violation of clearly established law, *Harlow*, 457 U.S. at 818. This Court has consistently repeated the importance of resolving immunity questions at the earliest stage in the proceeding, *Harlow*, 457 U.S. 800, 818; *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987); *Hunter v. Bryant*, 502 U.S. ____, ____, 112 S.Ct. 534, 536 (1991).

The decision below, however, has a chilling effect on Defendants who wish to comply with this dictate. Should a Defendant successfully challenge the sufficiency of the Complaint in the District Court, he will forfeit his right to Appellate review of his immunity claim on the facts outside the Complaint in the event the initial judgment in his favor is reversed.

Petitioner submits that the Seventh Circuit has adopted a ruling which has the effect of abridging a substantive right of public officials by restricting the jurisdiction conferred by 28 USC, Sec. 1291, *Cohen* and *Mitchell*. Such a rule, however, is beyond its powers, see *Willy v. Coastal Corporation*, 503 U.S. ____, ____, 112 S.Ct. 1076, 1079 (1992). Congress determines the scope of the jurisdiction of the Circuit Courts of Appeal, *Federal Power Commission v. Pacific Power & Light Company*, 307 U.S. 156, 159 (1939). In light of this Court's holding in *Mitchell* and

the absence of any congressional action to restrict the holding therein, Defendants in the Seventh Circuit have the right to invoke the jurisdiction of the Court of Appeals pursuant to 28 USC, Sec. 1291 to seek review of District Court denials of Motions for Summary Judgment on qualified immunity whether or not the Plaintiff has successfully pursued a prior appeal from a final judgment on the sufficiency of the Complaint and the Court of Appeals is bound to take the case and proceed to judgment, *Kline v. Burke Construction Company*, 260 U.S. 226, 234 (1922). Petitioner submits that the Courts of Appeals' jurisdiction to decide claims of qualified immunity prior to trial is neither more broad nor more narrow than that which is conferred upon them by 28 USC, Sec. 1291 and the decisions of this Court determining which orders are "final" under the collateral order doctrine.

III.

THIS CASE PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW WHICH HAS NOT BUT SHOULD BE SETTLED BY THIS COURT.

Public officials are often called upon to respond to emergencies where the lives of others are threatened. A recurrent question which is certain to arise repeatedly in the future is what, if any, concern may such officials give to the safety of would be rescuers who volunteer to enter potentially perilous situations in the aid of another without violating the substantive due process rights of the individual in need of rescue. One Circuit has held on facts quite similar to those of the case below that such concern is an entirely proper and appropriate consideration and has granted qualified immunity to police officers who prevented a civilian couple from jumping from a boat to attempt a rescue of a submerged individual who ultimately drowned, *Andrews v. Wilkins*, 934 F.2d 1267, 1271 (D.C. Cir., 1991).

Another Circuit has recently concurred that immunity exists when a public official substitutes one set of official rescuers in his employ rather than other purportedly qualified volunteers on the scene notwithstanding that such a change arguably contributed to the death of the victim, *Salas v. Carpenter*, 980 F.2d 299 (5th Cir., 1992).

The Seventh Circuit denied Petitioner's claim of immunity on a Complaint which alleged her decedent caused the death of Plaintiff's decedent by preventing private efforts of rescue in favor of public safety divers. When considered within the factual contours of this case, however, as required by *Anderson* it is clear that reasonable officers could have believed that danger to the would be rescuers outweighed any likelihood that William Ross would have been retrieved from the lake alive. This Court has ruled that the State is under no duty to provide its citizens with particular protective services, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).

Yet this Court has also determined that the State has a legitimate interest in the protection and preservation of human life and is not required to remain neutral in the face of an informed and voluntary decision by a physically able adult to embark on a potentially deadly course of action, *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). The question of the extent to which that interest exists when rescue efforts are undertaken by public officials and good samaritans volunteer their assistance remains an open one. Clearly, Gordon Johnson did not wish that William Ross would die. Just as clearly, he did not want to see injury befall others. Ross had been underwater for a length of time in excess of what Johnson had been trained was survivable. Trained public safety divers were responding. Johnson's conduct was not plainly incompetent nor did he knowingly violate the law, *Malley v. Briggs*, 475 U.S. 335, 343 (1986).

CONCLUSION

Petitioner, Lorraine Johnson, respectfully submits that this Court should grant this Petition and direct a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review its Order dismissing her appeal.

Respectfully submitted,

DANIEL PLAYFAIR FIELD
Counsel of Record
204 North West Street
Waukegan, Illinois 60085
(708) 662-5800
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 26, 1993

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

OLLIE B. ROSS, individually and as Administrator of the Estate of WILLIAM ROSS, Deceased,

Plaintiff-Appellee,

No. 92-3956 v.

LORRAINE JOHNSON, as Special Administrator of the Estate of GORDON JOHNSON, Deceased, who is sued in both his individual and his representative capacities,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5882—George W. Lindberg, Judge.

Upon consideration of the "PLAINTIFFS-APPELLEES MOTION TO DISMISS FOR LACK OF JURISDICTION" filed herein on 1/5/93, by counsel and the brief filed by the appellants,

IT IS ORDERED that said motion is GRANTED and this appeal is DISMISSED for want of jurisdiction. *See Abel v. Miller*, 904 F.2d 395 (7th Cir. 1990).

App. 2

[Dated September 2, 1987]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 86 C 5882

OLLIE BELLE ROSS, Individually and as Administrator of the Estate of WILLIAM ROSS,
Plaintiff,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,
Defendants.

REPORT AND RECOMMENDATION
of Magistrate Elaine E. Bucklo

Ross brought this suit under 42 U.S.C. § 1983 against Gordon Johnson, a deputy sheriff of Lake County, and other defendants. The suit arose from the drowning death of her son in Waukegan Harbor on August 11, 1985; in her complaint, Ross alleged that Johnson violated her son's Fourteenth Amendment right to life by arbitrarily preventing private individuals from attempting to rescue him. Before the court is Johnson's motion for summary judgment on the grounds of qualified immunity. I recommend that Johnson's motion be granted.

Qualified immunity protects public officials from liability for damages when their conduct did not violate a "clearly established statutory or constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether

the constitutional right was clearly established, the court should look to whether the law was clear in relation to the specific facts confronting the defendant, rather than at whether the broad general right alleged to have been violated was established. *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3039 (1987); *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987). Officials are not required to anticipate legal developments or the extension of existing legal principles; *Danenberger v. Johnson*, 821 F.2d 361, 363 (7th Cir. 1987); for a right to be clearly established, there must be case law "which clearly and consistently recognized the constitutional right" involved. *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 822 (1986) (quoting *Coleman v. Frantz*, 754 F.2d 719, 730 n. 15 (7th Cir. 1985)). Where the law involved requires a balancing of competing interests, the facts in existing case law must closely parallel the facts in the instant case before the defendant is deprived of qualified immunity. *Benson v. Allphin*, 786 F.2d 268 (7th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 172 (1986).

In the present case, Johnson allegedly violated Ross' right to life by forbidding a lifeguard and two fully equipped scuba divers from attempting to rescue Ross, despite their requests that they be allowed to make the attempt, and instead waiting twenty minutes for the arrival of divers from the Waukegan Fire Department. Prior case law did not clearly establish that Johnson's alleged conduct would violate Ross' son's rights. It was clear that arbitrary state action causing injury could violate a person's rights under the Fourteenth Amendment. *See e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 442 (1982) (Blackmun, J., concurring). But *Anderson v. Creighton, supra*, 107 S.Ct. at 3038-39, and *Colaizzi v. Walker, supra*, 812 F.2d at 307-08, require examination of the right in question at a

much greater level of particularity, in terms of whether the case law established that the specific conduct alleged violated the decedent's rights. At the time of the incident, no cases had been decided involving arbitrary state prevention of private rescue attempts. The closest cases factually were those involving failure to rescue; and these cases had held that absent discrimination or some special relationship between the municipality and the victim, failure to rescue was not actionable under § 1983. *E.g., Jackson v. City of Joliet*, 715 F.2d 1200, 1203-04 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984); *Beard v. O'Neal*, 728 F.2d 894, 899 (7th Cir.), *cert. denied*, 469 U.S. 825 (1984). These cases were distinguishable because they involved failure to rescue rather than prevention of private rescue attempts, which Ross alleged, and in dicta in *Jackson v. Byrne, supra*, 738 F.2d at 1448, the court did say that the state could violate a plaintiff's rights by arbitrarily preventing rescue as well as arbitrarily inflicting injury directly. However, there were no cases directly holding that state prevention of private rescue attempts could be actionable at all under § 1983, and if so under what circumstances. In attempting to rescue Ross' son, the private rescuers would have exposed themselves to some degree of danger, and Waukegan did have a municipal rescue team, albeit one which in this case was slow to respond. If the rescue team and the private rescuers were both at the scene of the accident, it might be reasonable for the municipality to prohibit private rescue attempts; and perhaps it would also be reasonable to prohibit such attempts for some time while awaiting arrival of municipal rescuers, where there would be a substantial risk to the private rescuers. The circumstances under which such a prohibition would cease to be reasonable and become arbitrary have not been delineated by the case law. Ross' action advances a novel claim (although supported by dicta

from the Seventh Circuit); but officials are not required to anticipate legal developments, *Danenberger v. Johnson*, *supra*, 821 F.2d at 363, *Benson v. Allphin*, *supra*, 786 F.2d at 275-76, and their immunity should not be defeated by novel claims. *Azeez v. Fairman*, 795 F.2d 1296, 1301 (7th Cir. 1986). Johnson is entitled to qualified immunity, and accordingly, his motion for summary judgment as to that part of Count I seeking to impose liability on him in his individual capacity should be granted.[1]

/s/ ELAINE E. BUCKLO
United States Magistrate

Dated: September 2, 1987

Written objections to any finding of fact, conclusion of law, or the recommendation for disposition of this matter must be filed with the Honorable Nicholas J. Bua within ten (10) days after service of this Report and Recommendation. *See* Fed.R.Civ.P. 72(b). Failure to object will constitute a waiver of objections on appeal.

Copies have been sent to: [omitted in printing.]

---

[1] Ross also argues that because Johnson was following county policies and had no discretion to allow private rescue attempts, he was acting in a ministerial rather than discretionary capacity and should not be allowed qualified immunity. Ross, however, pled in the alternative both that Johnson was acting in accordance with municipal policies and that he was acting outside of such policies and consequently in a discretionary capacity. Moreover, this circuit has questioned the value of the ministerial/discretionary function distinction, and has applied the tests for qualified immunity to lower level officials. *See Coleman v. Frantz*, 754 F.2d 719, 728-29 (7th Cir. 1985).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5882 Date: 15 Oct. 87

Name of Assigned Judge: JAMES B. ZAGEL

Case Title: ROSS v. ARMY CORPS OF ENGINEERS, et al

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendant Gordon Johnson's motion for summary judgment on Count I is GRANTED. Objections to Magistrate Bucklo's Report and Recommendation dated 2 Sep 87 are OVERRULED. Plaintiff's motion for leave to file the current first amended complaint is DENIED, but a new amended complaint may be filed on or before 28 Oct 87.

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute order form.)

* * * * *

ORDER

The plaintiff's motion for leave to file a first amended complaint is denied, insofar as it contains in Count I claims against Gordon Johnson, who, in his individual capacity, is entitled to qualified immunity. Plaintiff may, however, resubmit an amended complaint which does not contain these defects but such resubmission must be accomplished on or before 28 Oct 87.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5882 Date: 29 Aug 88

Name of Assigned Judge: JAMES B. ZAGEL

Case Title: OLLIE BELLE ROSS
UNITED STATES OF AMERICA, et al

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

The plaintiff's "federal claims" are dismissed. Both parties shall submit memoranda (not to exceed 15 pages) on the plaintiff's pendent state law claims on or by 03 Oct 88.

* * * * *

(12) ☒ (For further detail see ☒ order attached to the original minute order form.)

* * * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 5882 Date: 24 Aug 89

Name of Assigned Judge: JAMES B. ZAGEL

Case Title: ROSS, et al. v. UNITED STATES, et al

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Plaintiff's Motion for leave to file another amended complaint against the United States is denied. This case is dismissed in its entirety.

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute order form.)

* * * * *

ORDER

After carefully reviewing the parties brief, we conclude that it would be improper to retain jurisdiction over the plaintiff's state law claims. Additionally, we deny the plaintiff's motion to file another amended complaint against the United States. In our view the proposed amended complaint suffer from the same flaws that led us to dismiss the previous complaint. The Clerk is therefore directed to enter an order pursuant to Rule 58 dismissing this action in its entirety.

App. 9

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

OLLIE BELLE ROSS,
Plaintiff

v. CASE NO. 86 C 5882
Judge Zagel

UNITED STATES ARMY
CORPS OF ENGINEERS, et al,
Defendants

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, plaintiff's motion for leave to file another amended complaint against the United States is denied. This case is dismissed in its entirety.

August 24, 1989
Date

H. STUART CUNNINGHAM
Clerk

/s/ DONALD WALKER
(By) Deputy Clerk

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-3318

OLLIE BELLE ROSS, individually and as Administrator of the Estate of WILLIAM ROSS, deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, COUNTY OF LAKE IN STATE OF ILLINOIS, CLINTON O. GRINNELL, Sheriff of Lake County,* GORDON JOHNSON, Deputy Sheriff, CITY OF WAUKEGAN, WAUKEGAN FIRE DEPARTMENT AND PARAMEDICS, and WAUKEGAN LIFEGUARDS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5882—**James B. Zagel**, *Judge.*

ARGUED MAY 15, 1990—DECIDED AUGUST 16, 1990

---

* Originally, this appeal was docketed with Robert H. Babcox as defendant-appellee in his official capacity as sheriff of Lake County. At oral argument, we were informed that Mr. Babcox died during the pendency of the district court proceedings. Accordingly, Clinton O. Grinnell has been substituted as defendant-appellee in his official capacity as the current sheriff of Lake County. *See* FED. R. APP. P. 43(c); FED. R. CIV. P. 25(d).

Before WOOD, JR., and RIPPLE, *Circuit Judges*, and CRABB, *District Judge.***

WOOD, JR., *Circuit Judge.* The allegations in the plaintiff's complaint portray a stunning abuse of governmental power. Because we review this case after successful motions for summary judgment and for dismissal of the complaint, we have taken the facts in the light most favorable to the nonmoving plaintiff and have drawn all possible inferences in her favor. Thus, we have outlined the facts with these principles in mind, and our recitation should not be interpreted as an opinion on the veracity of any of the plaintiff's allegations. In addition, it should be remembered that none of the actors in this tragedy have had their day in court to disprove the plaintiff's claims.

I.

A. *Factual Background*

On August 11, 1985, the city of Waukegan, Illinois, held the Waukegan Lakefront Festival on the shores of Lake Michigan. Twelve-year old William Ross attended the event but abandoned the day's organized activities for a stroll with a friend on a breakwater that extended out into the lake. At the tip of the breakwater, William fell into the water and sank. Immediately, William's friend ran for help.

The plea of William's friend was answered promptly by on-duty Waukegan emergency personnel located at the nearby festival. Within ten minutes of William's entry into the water, two lifeguards, two firefighters, and one police officer were on the scene with equipment to effect a rescue. In addition, two nearby scuba-diving civilians offered the assistance of themselves, their boat, and their equipment.

** The Honorable Barbara B. Crabb, Chief Judge for the Western District of Wisconsin, is sitting by designation.

Before any rescue attempt could begin, however, Lake County Deputy Sheriff Gordon Johnson arrived in a marine patrol boat. The city of Waukegan and Lake County had previously entered into an intergovernmental agreement that required the county to provide all police services in the entities' concurrent jurisdiction on Lake Michigan. Under its authority to police the lake, the county and its sheriff had promulgated a policy that directed all members of the sheriff's department to prevent any civilian from attempting to rescue a person in danger of drowning in the lake. This policy contemplated that only divers from the city of Waukegan Fire Department could carry out such a rescue.

With this policy in mind, Deputy Johnson ordered all of the persons then on the scene to cease their rescue efforts. When the civilian scuba divers stated that they would attempt the rescue at their own risk, Johnson responded that he would arrest them upon their entry into the water and even positioned his boat so as to prevent their dive. A Waukegan police officer agreed that Johnson had authority over the scene and advised his fellow city employees that they should heed Johnson's instructions.

A full twenty minutes after the initial rescuers arrived at the scene and approximately thirty minutes after the boy had fallen into the water, the officially authorized divers finally retrieved William's body. Although William showed clinical signs of life after being pulled from the water, he was declared dead the following morning. For purposes of our decision, we must assume that William would have survived had Deputy Johnson not stopped the initial rescuers.

The United States Army Corps of Engineers built and maintained the breakwater. At the point where William fell off, part of the breakwater had broken away and had exposed a large crack. At the crack, the pitch of the breakwater's sloping angle suddenly became more pronounced and likely contributed to William's fall. Although the Army Corps of Engineers was aware of the breakwater's condition, it did nothing to repair the crack.

B. *Proceedings Below*

William's mother, Ollie Belle Ross, brought this suit in her individual capacity and in her capacity as administrator for William's estate.[1] Because the Army Corps of Engineers owned the breakwater, the complaint named the United States of America as one defendant. Under 42 U.S.C. § 1983, the plaintiff sued Deputy Johnson in both his individual and official capacity, alleging that Johnson violated William's civil rights by interposing state power to prevent rescue. The city of Waukegan,[2] the sheriff of Lake County, and the county itself were sued for promulgating policies that led Deputy Johnson to prevent William's rescue. In addition, the plaintiff asserted pendent state-law claims against the nonfederal defendants. The plaintiff voluntarily dismissed with prejudice her claims against other defendants not relevant to this appeal.

The case was referred to a magistrate, who heard motions to dismiss by all nonfederal defendants. The magistrate recommended that the district court deny these mo-

---

[1] In their brief, defendants Lake County, Sheriff Grinnell, and Deputy Johnson imply that Ms. Ross's suit should be dismissed to the extent that she has sued in her individual capacity. These defendants contend that Ms. Ross has only alleged injuries to her deceased son and has asserted no right of recovery for herself. *See Estate of Johnson v. Village of Libertyville*, 819 F.2d 174, 177-78 (7th Cir. 1987). Our examination of the complaint, however, reveals that Ms. Ross has asserted her own claim for reimbursement of her son's medical and funeral expenses pursuant to ILL. REV. STAT. ch. 40, ¶ 1015. Therefore, we decline the invitation to dismiss Ms. Ross from the suit in her individual capacity.

[2] In addition to the City of Waukegan, the plaintiff also named the Waukegan Fire Department, the Waukegan Fire Department Paramedics, and Waukegan Lifeguards as party defendants. The plaintiff alleges that these entities are "administrative subdivisions" of the municipality but has not suggested that the liability of these entities differs in any way from that of the city. Therefore, our discussion of the city of Waukegan's liability applies equally to these administrative subdivisions.

tions, and Judge Bua adopted this recommendation. Unsuccessful on his motion to dismiss the complaint for failure to state a claim, Deputy Johnson asserted qualified immunity and moved for summary judgment, but because the same law firm represented the potentially conflicting interests of the deputy and the county, the plaintiff moved that the law firm be disqualified. The magistrate denied the motion to disqualify but recommended that the district court grant Deputy Johnson's motion for summary judgment. While these proceedings were taking place, the case was reassigned from Judge Bua to Judge Zagel.

Judge Zagel adopted the magistrate's recommendation and granted summary judgment to Deputy Johnson. Hoping to cure defects, the plaintiff filed a first amended complaint. The nonfederal defendants then received leave to file a renewed motion to dismiss the complaint, which Judge Zagel granted. *See Ross v. United States*, 697 F. Supp. 974 (N.D. Ill. 1988). At the same time, the United States successfully sought dismissal of the claims against itself. *See id.* at 981-83. In a subsequent, unpublished decision, Judge Zagel considered retaining jurisdiction over the plaintiff's state-law claims but ultimately decided that these claims should be dismissed without prejudice to refile in state court. On the grounds that no defects in the pleadings could be cured, the plaintiff was also denied leave to file a second amended complaint.

Ross has now appealed the district court's decision to this court, asserting that the district court made various errors as to each of the defendants. Specifically, she claims that the district court erred in dismissing the substance of her complaint and in ruling that Deputy Johnson was entitled to qualified immunity. Also, Ross argues that she should have been allowed leave to file a second amended complaint and that the county's law firm should be disqualified from further representation of either the county or Deputy Johnson. Finally, Ross claims that because of the advanced state of the litigation, the district court at least should have retained jurisdiction over her pendent state-law claims.

II.

A. *Tort Liability of the United States*

The plaintiff's claim against the United States arises under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, and relies on the status of the United States as owner of the breakwater. Under these circumstances, the federal government is liable to the same extent that a private landowner would be liable under Illinois law. *See* 28 U.S.C. §§ 1346(b), 2674.

Private Illinois landowners do not guarantee the safety of children on their land. A landowner is under a duty to protect children from negligence only if (1) the landowner knows that children frequent the premises and (2) a dangerous condition exists on the land that is likely to cause injury to children who, by reason of their immaturity, are incapable of appreciating the risk involved. *Cope v. Doe*, 102 Ill. 2d 278, 286, 464 N.E.2d 1023, 1027, 80 Ill. Dec. 40, 44 (1984); *Corcoran v. Village of Libertyville*, 73 Ill. 2d 316, 326, 383 N.E.2d 177, 180, 22 Ill. Dec. 701, 704 (1978).

Even assuming that the United States government, acting through the Army Corps of Engineers, should have known that children frequented its breakwater, the plaintiff cannot show that William was incapable of appreciating the risk involved. The risk involved in this case was the possibility that William would fall off the breakwater and drown. Agreeing with the *Restatement (Second) of Torts*, a legion of Illinois cases have held that the risk of drowning is one generally appreciated by children, even children of a much lesser age than twelve-year old William. *E.g.*, *Cope*, 102 Ill. 2d at 286-87, 464 N.E.2d at 1027, 80 Ill. Dec. at 44 (seven-year old boy); *Wingate v. Camelot Swim Club, Inc.*, ____ Ill. App. 3d ____, ____, 550 N.E.2d 665, 666-67, 140 Ill. Dec. 780, 781-82 (1990) (five- and seven-year old children); *Hagy v. McHenry County Conservation Dist.*, 190 Ill. App. 3d 833, 546 N.E.2d 77, 81-82, 137 Ill. Dec. 453, 457-58 (1989) (boy in ninth grade); *Old Second Nat'l Bank v. Aurora Township*, 156 Ill. App. 3d

62, 66-67, 509 N.E.2d 692, 697-98, 109 Ill. Dec. 31, 36-37 (1987) (fourteen-year old boy); *Christon v. Kankakee Valley Boat Club*, 152 Ill. App. 3d 202, 204-05, 504 N.E.2d 263, 265, 105 Ill. Dec. 394, 396 (1987) (nine-year old girl); *Weber v. Village of Carol Stream*, 129 Ill. App. 3d 628, 631-32, 472 N.E.2d 1203, 1206, 84 Ill. Dec. 807, 810 (1984) (nine-year old boy); *Prince v. Wolf*, 93 Ill. App. 3d 505, 509, 417 N.E.2d 679, 680-82, 48 Ill. Dec. 947, 948-50 (1981) (fifteen-year old boy); *see also* RESTATEMENT (SECOND) OF TORTS § 339 comment j (1965) ("There are many dangers, such as those of fire and water, or of falling from a height, which under ordinary conditions may reasonably be expected to be fully understood and appreciated by any child of an age to be allowed at large."). Because the risk of falling off the breakwater and drowning is one generally appreciated by children of William's age, the United States, as a landowner, did not owe William a duty to protect him from this harm.

Understandably, the plaintiff places some reliance on *Pasierb v. Hanover Park Park District*, 103 Ill. App. 3d 806, 431 N.E.2d 1218, 59 Ill. Dec. 461 (1981), one of the few Illinois cases to impose landowner liability for a drowned child since the Illinois Supreme Court jettisoned the attractive nuisance doctrine in *Kahn v. James Burton Co.*, 5 Ill. 2d 614, 126 N.E.2d 836 (1955). The *Pasierb* court believed that a layer of ice and snow, completely disguising the location of a partially frozen creek, made for conditions where a child would not be able to discern the danger. *Id.* at 808-09, 431 N.E.2d at 1220, 59 Ill. Dec. at 463. Arguably, the conditions of the creek in *Pasierb* would even had made the danger unknown to an adult. Despite the best efforts of the plaintiff to cast her complaint in the rhetoric of *Pasierb*, no similar conditions exist in this case. William was certainly aware that Lake Michigan lurked a few feet away at the bottom of the sloping breakwater.

In an attempt to break from the authority of the Illinois cases, the plaintiff asserts that Illinois law only raises a presumption that children understand the risk of drown-

ing in water. She wants a chance to go before a jury and prove that the circumstances of this case made William unable to appreciate the risk. Nevertheless, the plaintiff fails to explain why many of the Illinois cases were resolved prior to trial, without evidence as to the maturity of the particular child in question. The Illinois courts have flatly stated that the test is an objective one, and the existence of a legal duty has traditionally been allocated to the court as a question of law. *Old Second Nat'l Bank*, 156 Ill. App. 3d at 66, 509 N.E.2d at 695, 109 Ill. Dec. at 34; *Fuller v. Justice*, 117 Ill. App. 3d 933, 942, 453 N.E.2d 1133, 1139, 73 Ill. Dec. 144, 150 (1983). Following the Illinois precedents, we are satisfied that we have all of the pertinent facts necessary for a resolution of this issue, and there is no need for further factual development. The issue is ripe for resolution on the pleadings.

Much of the plaintiff's argument is devoted to casting the breakwater as a menacing hazard, so "dangerously slanted" that a young boy would not appreciate the risk of falling. In the plaintiff's proffered second amended complaint, the breakwater becomes an even greater danger, with a half-hidden crack "making the pitch of the sloping angle of the Breakwater's surface" much more pronounced. Thus, according to the plaintiff, the hazard in this case was not Lake Michigan but the breakwater itself. No matter how the plaintiff attempts to dress it, the risk involved in this case is nothing more than the risk of falling and drowning. *See Corcoran*, 73 Ill. 2d at 328, 383 N.E.2d at 181, 22 Ill. Dec. at 705 ("It is apparent that, in spite of plaintiffs' attempts to characterize the ditch as one with particularly hazardous attributes, the pleadings . . . allege nothing more than the risk of falling into a ditch, a risk which is incident to any common ditch or obvious depression in the ground and one which children generally would be expected to recognize and appreciate."); *Christon*, 152 Ill. App. 3d at 204-05, 504 N.E.2d at 265, 105 Ill. Dec. at 396 ("Contrary to the plaintiffs' assertions, the real and obvious danger was the river."). The court in *Christon* held that children appreciate such

a risk, and we agree. *See* 152 Ill. App. 3d at 205, 504 N.E.2d at 265, 105 Ill. Dec. at 396. Because the plaintiff's second amended complaint did not cure these defects, the district court did not abuse its discretion in denying leave to file it against the United States. *E.g., Williams v. United States Postal Serv.*, 873 F.2d 1069, 1072 (7th Cir. 1989); *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985).

All waterfront landowners cannot be expected to guard against the risk that a boy will find the water an attractive playground. "Every man who has been brought up with the freedom allowed to American boys knows that you might as well try to dam the Nile with bulrushes as to keep boys away from ponds, pools and other bodies of water." *Sullivan v. Huidekoper*, 27 App. D.C. 154, 163-64 (D.C. Cir. 1906). Recognizing a legal duty on the part of the United States to protect William from harm on the breakwater would be akin to imposing a rule of absolute liability. Because Illinois law only imposes liability on landowners for those harms that are foreseeable, the United States was properly dismissed as a defendant from the suit.

B. *Liability of the City of Waukegan*

As a municipal entity, the city of Waukegan can only be liable if it had an official policy or custom that caused an injury to be inflicted on the plaintiff. *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978). To present her case in these terms, the plaintiff alleges that the city had a policy directing its employees to acquiesce in the unconstitutional actions and policies of the county. Thus, under the plaintiff's theory, the city would be liable because its policy caused city emergency personnel to stand idly by while Deputy Johnson forbade efforts to rescue William.[3]

---

[3] Arguing law of the case, the plaintiff also takes exception to Judge Zagel's reversal of Judge Bua's previous decision. No mat-

(Footnote continued on following page)

Stripped of their surplusage, the plaintiff's allegations stand for nothing more than the proposition that the city of Waukegan's emergency personnel followed established procedure and thereby failed to save William from drowning. Absent a constitutional duty to provide these rescue services, however, the city cannot be held liable. On this point, we need do no more than cite the line of precedent from the Supreme Court and this court, holding that the government's failure to provide essential services does not violate the Constitution. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1003-07 (1989); *Doe v. Milwaukee County*, 903 F.2d 499, 502 (7th Cir. 1990); *Archie v. City of Racine*, 847 F.2d 1211, 1220-23 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1338 (1989). The plaintiff's allegations of municipal policy cannot surmount the main obstacle to her claim: the city simply had no constitutional obligation to save William's life.

Beyond liability under a traditional municipal liability theory, the plaintiff also advances a novel proposition. Because of the intergovernmental agreement, the county and not the city was the governmental unit with employees on the scene who had the authority to direct the rescue. The plaintiff argues that the city should not be allowed to escape section 1983 liability by abdicating its responsibility to police Lake Michigan and make policy about water rescues. Of course, as we just noted above, the city of Waukegan has no constitutional responsibility to provide any kind of police services on the lake, giving the city a compelling argument that it makes no difference what it decides to do about patrols on Lake Michigan.

---

[3] *continued*
ter what the relevance of the law of the case doctrine to district judges successively assigned to the same case, we are certainly not bound by either Judge Zagel's or Judge Bua's decision on appellate review. *Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co.*, 632 F.2d 680, 683 (7th Cir. 1980); *see also Lujan v. Secretary of the Interior*, 58 U.S.L.W. 5077, 5080 n.1 (U.S. June 27, 1990) (court of appeals decision does not bind Supreme Court).

Nevertheless, a case could arise where a governmental entity transfers its policy-making authority so that it would be consistent with principles of municipal liability to hold the entity constitutionally responsible. This is not such a case.

At most, the city of Waukegan had concurrent jurisdiction with Lake County over shoreline patrols of Lake Michigan. The Illinois Constitution not only permits but encourages the use of intergovernmental agreements to coordinate the efforts of local governmental units. *See* ILL. CONST. art. VII, § 10. Following the directives of their own state constitution, the city and county properly agreed to eliminate costly overlapping efforts, leaving the county with the city's patrol boat and sole responsibility for Lake Michigan emergency services. It is clear that this arrangement was not merely a method for the city to escape legal liability. Under the agreement, the city had no authority to influence the county's procedures, and imposing liability on the city for the county's policies would effectively be the respondeat superior liability that the Supreme Court has soundly condemned. *See, e.g., City of Canton v. Harris*, 109 S. Ct. 1197, 1203 (1989); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 478-79 (1986); *Monell*, 436 U.S. at 694-95. We agree with the city that a contrary result would read potential section 1983 liability into every intergovernmental agreement in the state of Illinois.

A couple of procedural points need to be addressed. As was the case with her claim against the United States, the plaintiff's second amended complaint failed to cure the defects in her suit against the city, and consequently, it was not an abuse of discretion for the district court to deny leave to file it. *E.g., Williams v. United States Postal Serv.*, 873 F.2d 1069, 1072 (7th Cir. 1989); *Glick v. Koenig*, 766 F.2d 265, 269 (7th Cir. 1985). In her second amended complaint, the plaintiff added more details as to the events surrounding William's death but changed little of substance. The second amended complaint, like

her previous complaints, fails to show some constitutional duty that the city owed to William.

The plaintiff has also asserted numerous state law claims against the city, but because all federal claims were dismissed, some kind of pendent jurisdictional basis would be the only justification to retain the city as a defendant in the lawsuit. Whether the principles of pendent jurisdiction would ever provide a basis for retaining the city as a defendant in a lawsuit brought pursuant to 28 U.S.C. §§ 1343(3) and 1983 is doubtful. *See Aldinger v. Howard*, 427 U.S. 1, 16-17 (1976); *Huffman v. Hains*, 865 F.2d 920, 922 (7th Cir. 1989) (describing pendent party jurisdiction as an "embattled concept"). We need not resolve the issue here. The case has not proceeded past the pleading stage, and we cannot say that the district court abused its discretion in refusing to retain jurisdiction under the more general principles of pendent jurisdiction expressed in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). The city of Waukegan should be dismissed as a defendant to this suit.

C. *Liability of Lake County*

Like the city of Waukegan, Lake County can only be liable if one of its official policies or customs caused injury to William. We must accept as true the plaintiff's allegations that the county had a policy that required Deputy Johnson to prevent any unauthorized person from attempting to rescue another person in danger of drowning.[4] As the complaint frames the facts, unauthorized per-

[4] As alleged in the plaintiff's first amended complaint, the county had a policy that "required Johnson to forbid and prevent any civilian, not explicitly authorized to do so, from attempting to rescue a person in danger of drowning, and to continue to restrain and prevent such rescue until the arrival of divers from the Waukegan Fire Department, even though the proximate result of such conduct would or could be the serious injury or death of the drowning victim."

sons on the scene could have saved William's life, making the policy a direct cause of his death.

On appeal, the county's main argument rests on statements made in the plurality opinion of *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985), suggesting that proof of a single incident of unconstitutional activity is not sufficient to impose municipal liability unless it was the result of a facially unconstitutional policy. The county points out that the policy as alleged by the plaintiffs implies that the deputy on the scene could spontaneously authorize nearby civilians to attempt a rescue dive to save a drowning person. Thus, the policy does not necessarily contemplate that county deputies must cut off all means of private rescue, only that the deputies are imbued with a measure of discretion to balance the risk to private rescuers versus the likelihood that the victim will drown before waiting for an official rescue team to arrive. Using the county's theory, the policy is not facially unconstitutional, making the complaint defective because it only alleges a single application of the policy. This interpretation of the policy cuts against the rule that we take the plaintiff's allegations as true. More fundamentally, however, we believe that the county's argument was soundly rejected by the Supreme Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

The *Pembaur* Court made clear that the purpose of the "official policy" requirement is to distinguish between the act of a municipality and the acts of its employees. *Id.* at 479-80. Requiring proof of more than one application of an alleged policy helps to establish the existence of the policy and attribute any harm to the municipality. Where a particular course of action is authorized by a municipality's authorized decisionmakers, it represents a policy rightly attributed to the governmental entity, and in such a case, there is no need to resort to proof of the policy's multiple applications to attribute its existence to the municipality. *See id.* at 480-81; *Yeskigian v. Nappi*, 900 F.2d 101, 104 (7th Cir. 1990). The plaintiff's complaint implies that the alleged policy came from the highest level of deci-

sionmakers in the county government and in the sheriff's department. In such a case, even a single application of the policy is fairly attributed to the county.

Causation alone, however, is not enough; the plaintiff is entitled to a remedy only if she suffered a constitutional injury. We find the plaintiff has sufficiently alleged that the county arbitrarily denied William his fourteenth amendment right to life. In dismissing the complaint, the district court ruled that to establish liability under section 1983, the plaintiff must allege a policy that is itself unconstitutional rather than application of an otherwise constitutional policy in an unconstitutional manner. We need not reach this issue, because we believe that the policy alleged by the plaintiff is itself unconstitutional.

The district court believed that the policy was merely one point in a range of policy choices that the county could make.[5] *See Ross v. United States*, 697 F. Supp. 974, 981 (N.D. Ill. 1988). Because the district court saw all of the county's alternatives as "rational," it believed the choice of an appropriate policy within that range was one for the legislature, not the judiciary. *Id.* Although a wide range of alternative policies certainly must have been available for the county's consideration, that fact alone does not relieve the county of its constitutional duty not to act toward its citizens in an arbitrary manner. For example, instead of handing out citations, a municipality could more effectively enforce its traffic laws by shooting the tires out of speeding motorists' cars. Even though it could be an alternative method of law enforcement, no one would question that shooting at the tires of scofflaw

---

[5] We are mindful of the defendant's warning that the actions of the sheriff cannot be attributed to the county. *See Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2167 (1990). Reading the complaint in a light most favorable to the plaintiff, however, the county and the sheriff acted together in promulgating the alleged policy. Thus, we use the term "county" in a loose sense, to denote the actions of both the sheriff and the county.

motorists would deprive the motorists of their right to due process of law.

To answer our hypothetical, one might argue that our proposed method of ensnaring speeders is "irrational," while the alternative policy choices presented to Lake County were "rational." We think that such an analysis begs the question: what makes one policy "rational" while the next policy is "irrational"? The distinction between "rational" and "irrational" seems to be no different than stating the conclusion that one policy is "constitutional" while the next policy is "unconstitutional." Viewed in a traditional constitutional framework, the county's policy runs afoul of the fourteenth amendment.

This is not a case like *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998 (1989) or *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1338 (1989). In those cases, the government's failure to provide services that would have saved a person from injury was held not to be a constitutionally cognizable claim. The plaintiff complains of a much different type of constitutional wrong. The plaintiff does not allege that the county had a policy of refusing to supply rescue services. Rather, the wrong suffered by the plaintiff and her decedent is the county's forced imposition of services that William did not want or need; the plaintiff alleges that the county had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative.

In *Archie*, we rejected a section 1983 plaintiff's claim that a municipality's failure to dispatch an ambulance to a dying woman was an unconstitutional deprivation of life. Nevertheless, we suggested that where the state "greatly increased the risk while constricting access to self-help," a constitutional injury occurred. 847 F.2d at 1223. "When a state cuts off sources of private aid, it must provide replacement protection." *Id.* The plaintiff alleges that Lake County had a policy of cutting off private aid to drowning victims, even where the county's replacement

protection would not effect a rescue. Because the county's policy led to the deprivation of William's constitutionally protected right to life, the plaintiff's claim is cognizable under section 1983.

The county argues that the policy alleged by the plaintiff does not evince a deliberate indifference or recklessness toward human life, either of which is a necessary prerequisite to a constitutional violation. *See Archie*, 847 F.2d at 1218-20. We take the policy alleged in the plaintiff's complaint at its face value. The plaintiff alleges that the county had a policy that prevented rescue even of persons "in danger of drowning." Thus, as portrayed in the plaintiff's complaint, Lake County's policy not only tolerated a risk that someone might drown but actually contemplated that some persons would die for the sake of preventing harm to private rescuers. Protecting the lives of private rescuers rather than the lives of those drowning in the lake is an arbitrary choice. While no one suggests that the county desired to see people die in the waters of Lake Michigan, its alleged policy demonstrates a disregard for the value of the lives lost because of its enactment.

Whether the plaintiff is later able to prove the existence of Lake County's policy is inconsequential to our decision. As we must, we reached our decision assuming the truth of the plaintiff's complaint, and our discussion does not relieve the plaintiff of her burden to eventually prove her case by a preponderance of the evidence. The allegations in the plaintiff's first amended complaint were sufficient to state a cause of action against Lake County and Sheriff Grinnell; there is no need to consider the plaintiff's claim that the district court should have allowed the filing of a second amended complaint. Similarly, because the district court dismissed the plaintiff's state law claims without considering their merits, those claims should be reinstated on remand. We turn now to the plaintiff's claim against Deputy Johnson in his individual capacity.

D. *Liability of Deputy Johnson*

Before we consider the substance of the claims against Deputy Johnson, the plaintiff has raised a question about his lawyer's continued representation. Presumably financed by the county, the same law firm represents both Deputy Johnson and Lake County, which gives rise to a potential conflict of interest. Lake County's liability depends on the existence of the policy alleged in the plaintiff's complaint, but Deputy Johnson's cause will suffer if it is shown that he acted outside the authority of established county policies. The plaintiff raised this issue below, and the magistrate conditionally denied disqualification, contingent on the success of Deputy Johnson's motion for summary judgment. Of course, Johnson won his motion when the district court granted summary judgment to the deputy on the basis of qualified immunity.

The plaintiff failed to object to the magistrate's disqualification ruling, and normally that would waive the issue on appeal. *Video Views, Inc. v. Studio 21, Ltd.*, 797 F.2d 538, 539 (7th Cir. 1986). In promulgating this rule, we recognized its nonjurisdictional nature and stated that in special circumstances, the "ends of justice" might require us to review a magistrate's decision to which an appealing party failed to object. *Id.* at 540. Here, the magistrate ruled conditionally, and the plaintiff's failure to object is understandable. If the condition did not occur, the magistrate would have reconsidered her ruling. Thus, this case arguably presents one of those special circumstances that warrant review of a magistrate's decision to which there was no objection. But we need not decide this issue. A decision to disqualify is an exercise of the court's discretion, and on appellate review, we decline to rest our ruling on the disqualification of the defendants' attorneys. Disqualification would send the parties back for new attorneys and new briefs, causing more delay in a case that has not proceeded past the pleading stage in four years. Neither Lake County's nor Deputy Johnson's cause has suffered in this court for want of competent representation.

Nevertheless, because we find that the plaintiff has stated a valid claim against Johnson, on remand the district court should revisit the disqualification issue. A serious potential for conflict exists in the differing interests of the county and its employee. While this circuit has rejected the almost absolute prohibition on dual representation of a municipality and its employees espoused in *Dunton v. Suffolk County*, 729 F.2d 903 (2d Cir. 1984), we have remained sensitive to the fact that such conflicts can arise. *See Coleman v. Smith*, 814 F.2d 1142, 1147-48 (7th Cir. 1987) (discussing issue although denying motion). It is not enough that the county would be liable for any compensatory damage award that Deputy Johnson would pay, *see* ILL. REV. STAT. ch. 24, ¶ 1-4-6; Johnson will still suffer the effect of any punitive damages not to mention the injury to his reputation as a law enforcement officer. The law firm representing Johnson and Lake County has made every effort to avoid this conflict, but some conflicts are unavoidable. On remand, the district court should determine whether Deputy Johnson's interests are adverse to those of Lake County and, if these interests are diverse, whether the conflict is so severe that the interests of justice require disqualification even though both parties consent to the dual representation.

In our discussion of Lake County's liability, we held that William was illegally deprived of his life within the meaning of the fourteenth amendment. Because Deputy Johnson acted under the color of state law to cause this deprivation, he is liable unless he is entitled to qualified immunity on the grounds that the law was not clearly established at the time of the accident. We are mindful of the Supreme Court's admonition in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) that the contours of the constitutional right in question "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Consequently, we must decide whether it was clearly established on August 11, 1985, that a citizen in peril for his life had a constitutional right that prevented a police officer from cutting off private

avenues of lifesaving rescue without providing an alternative. We believe that this right was clearly established on that date.

In 1983, we held that a police officer's failure to pull car accident victims from the burning wreckage was not a deprivation of life in violation of the fourteenth amendment, but in the course of that opinion we observed, "[I]f officer Taylor, knowing the car was occupied and wanting the occupants to be burned to death, directed traffic away from the scene in order to prevent any passing driver from saving them, he would be liable." *Jackson v. City of Joliet*, 715 F.2d 1200, 1202 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984). In 1984, we denied a section 1983 claim for deaths in a fire that occurred when Chicago police officers barred striking firefighters from entering a station house, but we agreed "that the state can deprive a person of life by directly inflicting harm on him or by preventing others from rescuing him." *Jackson v. Byrne*, 738 F.2d 1443, 1448 (7th Cir. 1984). The point of quoting two passages of our dicta is not that we believe Deputy Johnson was an avid reader of the *Federal Reporter* and was aware of these statements. Rather, the passages demonstrate what has always been a fundamental tenet of our constitutional jurisprudence, even before the *DeShaney* and *Archie* decisions: the state cannot arbitrarily assert its power so as to cut short a person's life.

Taking this abstract principle into the specific factual situation facing Deputy Johnson as *Anderson* says we must, a reasonable police officer in Deputy Johnson's position should have known that he could not use that authority to prevent private rescue efforts. When Johnson arrived on the scene, the complaint alleges that trained, on-duty rescue personnel were present. The identity of these persons should have been known to Johnson either through the uniforms they were wearing or through a few questions that Johnson could have quickly asked. There was simply no rational reason for Johnson to prefer "authorized" but equally competent rescuers located away from the scene.

Finally, Johnson argues that his actions were at most negligent, an insufficient mental state for a constitutional violation. *See Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels v. Williams*, 474 U.S. 327 (1986); *Archie v. City of Racine*, 847 F.2d 1211, 1218 (7th Cir. 1988) (en banc), *cert. denied*, 109 S. Ct. 1338 (1989). There is no suggestion in the complaint that Johnson maliciously desired the boy to die. But intent is not always required to establish a due process violation; our precedents have accepted recklessness as a proxy for actual intent. *See, e.g., Bieneman v. City of Chicago*, 864 F.2d 463, 466 (7th Cir. 1988), *cert. denied* 109 S. Ct. 2099 (1989); *Archie*, 847 F.2d at 1219; *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988). For recklessness in the constitutional sense, the state actor must ignore a known and significant risk of death. *Archie*, 847 F.2d at 1219.

In this case, the plaintiff has pleaded sufficient facts for a jury to conclude that Johnson acted in a reckless manner. When he arrived on the scene, Johnson knew that the boy had already been under the water for at least a few minutes, and because of his training, Johnson also knew that it could take as little as five minutes for a person to die by drowning. Either through their uniforms or through a quick inquiry, Johnson could have readily ascertained that the alternative on-site rescue personnel were qualified to save the drowning boy. Nevertheless, Johnson waited until twenty minutes later for the "authorized" rescue squad to arrive. Using the facts alleged in the plaintiff's complaint, it is clear that Johnson knew there was a substantial risk of death yet consciously chose a course of action that ignored the risk. Such conduct is reckless.

The plaintiff has stated a cause of action against Johnson, and Johnson has failed to establish that he is qualifiedly immune. Because the district court dismissed them without reaching their merits, the pendent state claims should also be reinstated against Johnson.

III.

Underlying the defendants' arguments is the belief that the plaintiff will be unable at trial to prove any of the allegations in her complaint. That may be, but we have to accept those allegations as true, and the plaintiff has stated a section 1983 cause of action against the county defendants. The judgment of the district court dismissing the United States and the city of Waukegan defendants is affirmed. The judgments of the district court dismissing the Lake County defendants and granting summary judgment to Deputy Johnson are reversed. The case is remanded for further proceedings in accordance with this opinion. Circuit Rule 36 shall apply on remand. Each party shall bear their own costs.

AFFIRMED IN PART,
REVERSED IN PART,
AND REMANDED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: August 16, 1990

BEFORE:

Honorable Harlington Wood, Jr., Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Barbara B. Crabb, District Judge*

No. 89-3318

OLLIE BELLE ROSS, individually and as Administrator of the Estate of WILLIAM ROSS, deceased,

Plaintiff-Appellant

v.

UNITED STATES OF AMERICA, COUNTY OF LAKE IN STATE OF ILLINOIS, ROBERT H. BABCOCK, Sheriff of Lake County, GORDON JOHNSON, Deputy Sheriff, CITY OF WAUKEGAN, WAUKEGAN FIRE DEPARTMENT AND PARAMEDICS and WAUKEGAN LIFEGUARDS,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 5882, Judge James B. Zagel

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

* The Honorable Barbara B. Crabb, Chief Judge for the Western District of Wisconsin, is sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the district court dismissing the United States and the City of Waukegan defendants is AFFIRMED and the judgments of the district court dismissing the Lake County defendants and granting summary judgment to Deputy Johnson are REVERSED; the case is REMANDED for further proceedings; Circuit Rule 36 shall apply on remand; each party shall bear its own costs, in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Case Number: 86 C 5882 Date: December 3, 1992

Name of Assigned Judge: George W. Lindberg

Case Title: Ross v. County of Lake, et al.

MOTION:

Defendant Lorraine Johnson's motion for summary judgment.

DOCKET ENTRY:

* * * * *

(10) ☒ [Other docket entry] Defendant Lorraine Johnson's motion for summary judgment is denied. The qualified immunity issue defendant Lorraine Johnson attempts to raise is precluded by the Seventh Circuit's prior decision in this case. *Ross v United States*, 910 F2d 1422 (7th Cir 1990).

* * * * *

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 5, 1993

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

OLLIE B. ROSS, individually and as Administrator of the Estate of WILLIAM ROSS, Deceased,

Plaintiff-Appellee,

No. 92-3956 v.

LORRAINE JOHNSON, as Special Administrator of the Estate of GORDON JOHNSON, Deceased, who is sued in both his individual and his representative capacities,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5882—George W. Lindberg, Judge.

On February 26, 1993, we dismissed this appeal for want of jurisdiction under *Abel v. Miller*, 904 F.2nd 394 (7th Cir. 1990), which precludes successive appeals of the issue of qualified immunity. On March 12, 1993, defendant-appellant Lorraine Johnson, as Special Administratrix of the Estate of Gordon Johnson, Deceased, filed a Petition for Rehearing on the Issue of Jurisdiction, urging us to reinstate this appeal. In the Petition, defendant/appellant

contends that *Abel* is distinguishable on two grounds and that we have jurisdiction over this appeal. First, she attempts to distinguish *Abel* on the ground that the prior appeal in this case, *Ross v. U.S.*, 910 F.2nd 1422 (7th Cir. 1990), was brought by plaintiff Ross, while this appeal is the first brought by defendant Johnson. Next, she attempts to distinguish *Abel* by pointing out that the prior appeal in this case was from a final judgment while this is the first interlocutory appeal in this case.

While these arguments are novel, we are unpersuaded. Johnson reads our decision in *Abel* too narrowly for as we stated there "[o]ne full and fair appellate review on the question of 'shall there be a trial?' is sufficient." *Abel v. Miller*, 904 F.2nd at 397. *Abel* thus teaches that a single pretrial appeal of the qualified immunity issue accommodates the competing policies of protecting public officers from frivolous claims and of curtailing the cost and delay in prosecuting official misconduct suits. *Id.* Accordingly, the Petition for Rehearing on the Issue of Jurisdiction is DENIED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 10, 1990.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. BARBARA B. CRABB, District Judge*

No. 89-3318

OLLIE BELLE ROSS, individually and as Administrator of the Estate of William Ross, deceased,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, County of Lake in State of Illinois, CLINTON O. GRINNELL, Sheriff of Lake County, GORDON JOHNSON, Deputy Sheriff, CITY OF WAUKEGAN, WAUKEGAN FIRE DEPARTMENT AND PARAMEDICS, and WAUKEGAN LIFEGUARDS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5882—James B. Zagel, *Judge.*

---

* The Honorable Barbara B. Crabb, Chief Judge for the Western District of Wisconsin, is sitting by designation.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendants-appellees Gordon Johnson, Clinton Grinnell and County of Lake on August 30, 1990, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *in banc* be, and the same is hereby, DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

OLLIE BELLE ROSS, individually, and as administrator of the Estate of WILLIAM ROSS, deceased,

Plaintiff,

vs.

COUNTY OF LAKE in the STATE OF ILLINOIS; CLINTON GRINNELL, as Successor to ROBERT BABCOX, SHERIFF OF LAKE COUNTY; LORRAINE JOHNSON as Special Administrator of the Estate of GORDON JOHNSON, Deceased, who is sued in both his individual and his representative capacities, and CITY OF WAUKEGAN,

Defendants.

No. 86 C 5882—Judge Lindberg

NOTICE OF APPEAL

Notice is hereby given that Lorraine Johnson, special administratrix of the estate of Gordon Johnson, deceased, defendant above-named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order denying her motion for summary judgment in her individual capacity on the basis of qualified immunity entered in this action on December 3, 1992.

Dated: December 3, 1992

/s/ DANIEL P. FIELD

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

April 15, 1993

By the Court:

OLLIE B. ROSS, individually and as Administrator of the Estate of WILLIAM ROSS, Deceased,

Plaintiff-Appellee,

No. 92-3956 v.

LORRAINE JOHNSON, as Special Administrator of the Estate of GORDON JOHNSON, Deceased, who is sued in both his individual and his representative capacities,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 5882—George W. Lindberg, Judge.

This matter comes before the court for its consideration of the APPELLANT'S MOTION TO STAY ISSUANCE OF MANDATE filed herein on 4/12/93, by counsel. On consideration thereof,

IT IS ORDERED that said motion is GRANTED and the mandate in this appeal is STAYED to and including 5/14/93.

DISTRIBUTED
JUN 2 3 1993

ORIGINAL

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LOUIS R. KOSMAN
KATHRIN S. KATKOV
Counsel of Record
222 S. LaSalle Street
Suite 800
Chicago, Illinois 60085
(312) 236-8003

Attorneys for Respondents

QUESTIONS PRESENTED

Is a public official being sued under 42 U.S.C. §1983 entitled to indefinitely delay trial on the merits by filing multiple appeals on the same issue of qualified immunity, notwithstanding the fact that the Court of Appeals has decided definitively in the first appeal, that the official was not entitled to immunity as a matter of law, particularly when the successive appeals raise the same arguments that were raised in the first appeal, and when the issue turns on numerous factual questions germane solely to this case, and which require a trial on the merits?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

I. FACTUAL BACKGROUND 1

II. PROCEDURAL HISTORY 3

REASONS FOR DENYING THE WRIT 7

I. THIS PETITION RAISES NO ISSUE OF CONSTITUTIONAL SIGNIFICANCE WARRANTING THE GRANT OF CERTIORARI . . 7

II. EVEN IF A SECOND INTERLOCUTORY APPEAL WERE THEORETICALLY POSSIBLE UNDER MITCHELL V. FORSYTH, IT WOULD NOT BE AVAILABLE IN THIS CASE . . 11

CONCLUSION 14

TABLE OF AUTHORITIES

Abel v. Miller, 904 F.2d 394 (7th Cir. 1990) 9

Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989) 13

Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991), *cert. den.* 113 S.Ct. 62 (1992) 12

Elliott v. Thomas, 937 F.2d 338, 342 (7 Cir. 1991), *cert. den.* 112 S.Ct. 1242 (1992) 11

Feliciano-Angulo v. Rivera-Cruz , 858 F.2d 40 (1st Cir. 1988) 9

Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991) 11

Lion Boulos v. Wilson, 834 F.2d 504, 509 (5th Cir. 1987) . . 11

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985) 7, 8, 9, 10, 11, 13, 14

Murphy v. Morris, 849 F.2d 1101, 1103-04 (8th Cir. 1988) . . 10

Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992) 9, 10

Ross v. United States, et. al. 910 F.2d 1422, 1424-25 (7th Cir. 1990) 3

Ryan v. Burlington County, 860 F.2d 1199, 1203 n.8 (3d Cir. 1988), *cert. den. sub. nom.* Fauver v. Ryan, 109 S.Ct. 1745 (1989) 11

Velasquez v. Senko, 813 F.2d 1509, 1511 (9th Cir. 1987) . . . 11

42 U.S.C. §1983 . . . . . *passim*

NO. 92-1823

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LORRAINE JOHNSON, as Special Administratrix of the Estate of GORDON JOHNSON, Deceased,

Petitioner,

v.

OLLIE BELLE ROSS, Individually, and JESSE ROSS, Representative of the Estate of WILLIAM ROSS, Deceased,

Respondents.

Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[1]

This case has been brought to recover for wrongful death under 42 U.S.C. §1983 by the mother and other family members of William Ross, a 12 year-old boy who drowned off a breakwater in Waukegan, Illinois in August of 1985. The case, although filed in 1986, has

[1] These facts are gleaned from Plaintiffs' Counter-Statement of Uncontested Facts and supporting materials filed in opposition to Johnson's Motion for Summary Judgment, pursuant to Local Rule 12 of the United States District Court of the Northern District of Illinois.

not been tried. It comes before this Court in the wake of the Seventh Circuit Court of Appeal's second successive dismissal of Petitioner, Gordon Johnson's claims of qualified immunity.

The undisputed facts of this case remain as they were summarized in the opinion of the Seventh Circuit Court of Appeals when the case first came before it in 1990:

> *On August 11, 1985, the city of Waukegan, Illinois, held the Waukegan Lakefront Festival on the shores of Lake Michigan. Twelve-year old William Ross attended the event but abandoned the day's organized activities for a stroll with a friend on a breakwater that extended out into the lake. At the tip of the breakwater, William fell into the water and sank. Immediately, William's friend ran for help.*
>
> *The plea of William's friend was answered promptly by on-duty Waukegan emergency personnel located at the nearby festival. Within ten minutes of William's entry into the water, two lifeguards, two fire-fighters, and one police officer were on the scene with equipment to effect a rescue. In addition, two nearby scuba-diving civilians offered the assistance of themselves, their boat, and their equipment.*
>
> *Before any rescue attempt could begin, however, Lake County Deputy Sheriff Gordon Johnson arrived in a marine patrol boat. The city of Waukegan and Lake County had previously entered into an intergovernmental agreement that required the county to provide all police services in the entities' concurrent jurisdiction on Lake Michigan. Under its authority to police, the lake, the county and its sheriff had promulgated a policy that directed all members of the sheriff's department to prevent any civilian from attempting to rescue a person in danger of drowning in the lake. This policy contemplated that only divers from the city of Waukegan Fire Department could carry out such a rescue.*
>
> *With this policy in mind, Deputy Johnson ordered all of the persons then on the scene to cease their rescue efforts. When the civilian scuba divers stated that they would attempt the rescue at their own risk, Johnson responded that he would arrest them upon their entry into the water and even positioned his boat so as to prevent their dive. A Waukegan policy officer agreed that*

> *Johnson had authority over the scene and advised his fellow city employees that they should heed Johnson's instructions.*
>
> *A full twenty minutes after the initial rescuers arrived at the scene and approximately thirty minutes after the boy had fallen into the water, the officially authorized divers finally retrieved William's body. Although William showed clinical signs of life after being pulled from the water, he was declared dead the following morning.*

Ross v. United States, et. al. 910 F.2d 1422, 1424-25 (7th Cir. 1990).

II. PROCEDURAL HISTORY

After Plaintiffs filed their action against Gordon Johnson, the County of Lake and others in Federal district court, Johnson moved to dismiss the Complaint, citing precisely the issue of qualified immunity that is involved here: namely, whether he knew or should have known that his actions on August 11, 1985 would constitutionally deprive William Ross of his life. While that motion was initially granted by the district court, it was reversed in 1990 by the Seventh Circuit Court of Appeals in the first appeal on this issue. Then, the Court of Appeals, assuming the allegations of the Complaint to be true, held that the law in 1985 clearly established that Gordon Johnson, by unreasonably depriving William Ross of the services of voluntary rescuers, without providing a meaningful alternative rescue service, violated Ross' rights under 42 U.S.C. §1983. The case was thus remanded for discovery and trial.

Tellingly, the Complaint's recitation of the facts leading up to William's death were amply proven by discovery, and, with few exceptions, have never been the subject of any serious dispute.[2] It is undisputed, for example, that lifeguards (in uniform), fire department personnel, and policemen responded to the friends' call for help and were on the end of the breakwater with rescue equipment within minutes of William's fall into the lake.

It is similarly undisputed that the lifeguards and the fire fighters were ready and willing to attempt a rescue -- as were the two civilian scuba divers that arrived shortly thereafter, dressed in full wet suits, oxygen tanks, weight belts and other safety equipment. It is undisputed that Gordon Johnson threatened and prevented all of these would-be rescuers from attempting to save William Ross, and continued to do so for a period in excess of 25 minutes. It is similarly not contested that one of two civilian divers specifically timed the interval between the time his volunteered rescue services were rebuffed by Gordon Johnson and the time it took the "official" divers to arrive, and timed it at 18 minutes. It is also undisputed that William Ross was recovered quickly once a rescuer was allowed into the water, that William was located beneath the thermocline, in extremely cold water, and that

---

[2] Concededly, there is a vigorous dispute amongst the parties as to whether Johnson was acting pursuant to official policy when he prevented the lifeguards, fire fighters and civilian rescuers from attempting to save William Ross--hence the County and Sheriff's Motion for Summary Judgment. However, the presence or absence of an official policy is irrelevant to Johnson's quest for qualified immunity, and thus is of no importance here.

even after the extended period underwater, he was resuscitated and lived for several hours before dying early the next morning. (The issue of water temperature is of no small importance, as -- contrary to the representations made in Johnson's Petition -- by 1985 it was known that a drowning individual's possible survival time in cold water was substantially longer than in warmer water -- and far longer than the five minutes claimed by Johnson).

After discovery, Johnson[3] made yet another attempt to have this matter dismissed on qualified immunity grounds, filing a Motion for Summary Judgment. Johnson's motion rested on the theory that Johnson, allegedly a trained and experienced public safety diver, made a reasoned and informed decision that weather and wave conditions and the structure of the breakwater were too hazardous to permit "non-official" rescue attempts -- even by trained civilian scuba divers who were equipped identically to the diver who eventually rescued William Ross.

Plaintiffs opposed the motion on several grounds. First of all, Plaintiffs noted that Gordon Johnson's attempt to revisit the legal issues of qualified immunity motion was foreclosed by the prior decision and order of the Seventh Circuit Court of Appeals, and was thus barred by the law of the case doctrine. Second, the Plaintiffs observed that the fundamental premises of the motion -- the purportedly "dangerous nature" of any attempted rescue -- was

---

[3] Gordon Johnson died while the first appeal was pending and the Administratrix of his estate substituted. For convenience, both the individual and his estate will be referred to as "Johnson".

ludicrous in light of the testimony of a number of witnesses -- including all of the would-be rescuers on the breakwater that day, -- as well as by the simplicity of the "rescue" which was finally allowed to take place. Johnson's theory was, moreover, all but completely undercut by his own actions at the scene, where he failed to take notice of or inquire into any of the volunteer rescuers' qualifications, failed to make any inquiry as to where the official rescuers were and when they would arrive, and failed even to ask how long the boy had been in the water when Johnson arrived on the scene to "take charge". His after-the-fact justification for preventing the rescue attempts was even more strikingly impeached by his statements in official reports, in which he stated that he refused to let the divers into the water because of a Department "policy" of not using civilian divers under any circumstances.

Given both the highly contested nature of the facts upon which Johnson relied to support his immunity defense and the significant body of uncontested evidence showing the arbitrary and reckless nature of Johnson's conduct, Plaintiffs contended that Johnson's summary judgment motion was not only insupportable, but that the evidence would instead support summary judgment in Plaintiffs' favor.

This case was set for jury trial commencing December 7, 1993. On December 3, the District Court denied Johnson's motion for summary judgment, citing to the Seventh Circuit's earlier holding that Johnson was not entitled to qualified immunity as a matter of

law. Johnson filed a notice of appeal to the Seventh Circuit Court of Appeals the next day. Plaintiffs thereafter moved to dismiss that appeal for want of jurisdiction. After permitting Johnson to file his brief on the merits, the Court of Appeals granted that motion, and dismissed the appeal on February 28, 1993, citing authority within the Circuit precluding more that one interlocutory appeal on the issue of qualified immunity. Johnson's petition for rehearing on that ruling was also denied, with opinion, on April 5, 1993.

REASONS FOR DENYING THE WRIT

I. THIS PETITION RAISES NO ISSUE OF CONSTITUTIONAL SIGNIFICANCE WARRANTING THE GRANT OF CERTIORARI.

Petitioner labors long and hard in attempting to manufacture a conflict among the Circuits -- a task foreclosed by the fact that none exists.

Every Circuit that has directly addressed the issue presented here -- whether Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985), authorizes successive appeals limited to the issue of the existence of qualified immunity -- has answered that question in the negative. In fact, no Court of Appeals has, directly or indirectly, endorsed the argument espoused by Johnson here: that he is entitled to a second interlocutory appeal on the legal existence of qualified immunity, despite the existence of a very detailed prior Court of Appeals holding that Johnson's conduct clearly violated established law at the time the boy drowned, solely because he now raises it via a motion for summary judgment, rather

than the motion to dismiss utilized the first time around. The decisions of the Circuits are not "incoherent", as Petitioner claims, they merely fail to support Johnson's position.

At the risk of belaboring the obvious to this Court, the Ross family feels constrained to observe that the exception to the final order doctrine fashioned for qualified immunity determinations in Mitchell v. Forsyth was very narrow:

> *[W]e hold that a District Court's denial of qualified immunity, to the extent it turns on issues of law, is an appealable "final order" within the meaning of 28 USC § 1291 notwithstanding the absence of a final judgment.*

(Emphasis supplied) Mitchell, 472 U.S. at 530.

As this holding, and the Court's underlying analysis make clear, public officials are not even entitled to interlocutory appeal of a denial of qualified immunity if that denial turns on issues of fact, not of law. *See generally* Section II, *infra*. To a like extent, this conclusion certainly does not support, either on its face or by implication, any contention that public officials are entitled to interlocutory appeal of any and all issues relating to claims of qualified immunity, or to unlimited appeals of rulings on repeated motions raising the qualified immunity defense.

That the right to an immediate appeal under Mitchell is a limited one, and does not contemplate successive appeals revisiting the legal issue of whether the law was clearly established, is generally accepted by all Courts of Appeal considering the issue. In addition to the Seventh Circuit, the First, and most recently, the Ninth Circuit have also specifically concluded that Mitchell

authorizes one, and only one, appeal on the issue of qualified immunity. Feliciano-Angulo v. Rivera-Cruz , 858 F.2d 40 (1st Cir. 1988); Abel v. Miller, 904 F.2d 394 (7th Cir. 1990); Pelletier v. Federal Home Loan Bank of San Francisco, 968 F.2d 865 (9th Cir. 1992). Pelletier is particularly instructive in outlining the need to carefully circumscribe the opportunity to delay trial through *seriatim* Mitchell appeals, 968 F.2d at 870 (citations omitted):

> ***We do not, however, hold that an official defendant claiming qualified immunity may take advantage of the several opportunities for immediate appeal afforded him by bringing repeated pretrial appeals. Pelletier's contention that a rule allowing interlocutory appeals from denials of motions to dismiss, as well as from denials of summary judgment will encourage official defendants in civil rights cases to use such appeals as delaying tactics is not an idle one. As we have previously observed, "government defendants apparently now deem it mandatory to bring these appeals from any adverse ruling, no matter how clearly correct the trial court's decision." If appeals from denials of qualified immunity are also to become routine at the motion to dismiss stage, the burden on civil rights plaintiffs, in terms of both delay and expense could be considerable.***
>
> ***More important, the practice of filing routine appeals from denials of pretrial motions for qualified immunity, even in cases in which the district court was clearly correct, evinces a flagrant disregard of the Court's intent in creating the qualified immunity doctrine. The doctrine was created in order to protect good faith exercises of official discretion, not to shield willful or knowing lawless action taken under color of official authority. It was intended to permit "[i]nsubstantial lawsuits [to] be quickly terminated," not to deter legitimate lawsuits from proceeding. The Court has repeatedly and emphatically refused to accord absolute immunity to government officials accused of constitutional transgressions.***
>
> ***[2] For the same reasons that an official defendant may not use the immediate appeal that the law allows him to convince the court to resolve disputed factual issues in his favor, he also may not demand repeated appellate consideration of a claim of***

> *qualified immunity that the district court has repeatedly rejected. One such interlocutory appeal is all that a government official is entitled to and all that we will entertain.*

Pelletier's unassailable logic and realistic assessment of the negative impact repeated qualified immunity appeals would have on civil rights litigation is unchallenged by any contrary authority on point. Indeed, purportedly the "conflicting" rulings Johnson proffers do not deal with Johnson's issue at all; rather, they discuss the potential for successive appeals on **clearly distinct claims** of absolute and qualified immunity -- and only on that basis allow that successive appeals could be warranted. See, e.g., Murphy v. Morris, 849 F.2d 1101, 1103-04 (8th Cir. 1988).

In short, there is no significant constitutional issue or conflict among the Circuits on the availability of successive pre-trial appeals on qualified immunity issues. Two Circuits have addressed the issue directly and agree with the Seventh Circuit's holding that successive appeals are not authorized by Mitchell. The remaining Circuits simply have not directly confronted the question.

Try as he might, Johnson simply cannot fashion a constitutional issue from the dismissal of the second appeal. This case remains as it was: a unique case which turns on its own compelling facts -- facts that are of concern only to the parties involved -- and which presents no significant issue for consideration by this Court. Those facts properly lie before a jury in the United States District Court for the Northern District of Illinois.

II. EVEN IF A SECOND INTERLOCUTORY APPEAL WERE THEORETICALLY POSSIBLE UNDER MITCHELL V. FORSYTH, IT WOULD NOT BE AVAILABLE IN THIS CASE.

Johnson's attempts to obtain a second interlocutory appeal on qualified immunity by fashioning an issue worthy of the attentions of this Court is, at bottom, an exercise in futility, as any interlocutory appeal in this case is doomed, regardless of the outcome here. It is clear that neither a summary judgment finding qualified immunity, nor an interlocutory appeal of the denial of summary judgment on that basis, will lie when the issue of immunity turns on factual issues. As the Seventh Circuit Court of Appeals has pointed out:

> *It would extend Mitchell well beyond its rationale to accept an appeal containing nothing but a factual issue. We have expressed concern that being too ready to entertain interlocutory appeals on immunity grounds would increase the expense plaintiffs must bear, and the delay they must endure, to vindicate their rights... Mitchell did not create a general exception to the finality doctrine for public employees. Every court that has addressed the question expressly held that Mitchell does not authorize an appeal to argue "we didn't do it". We join them.*

(Citations omitted) Elliott v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991), *cert. den.* 112 S.Ct. 1242 (1992). As the Seventh Circuit also observed in Elliott, this is not an issue that has caused any conflict among the various Courts of Appeal, or indeed given them any real difficulty; every Circuit considering the issue has uniformly and unequivocally held that an immediate interlocutory appeal is not available when the assertion of qualified immunity turns on issues of contested material fact. Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991); Ryan v. Burlington County, 860 F.2d

1199, 1203 n.8 (3d Cir. 1988), *cert. den. sub. nom.* Fauver v. Ryan, 109 S.Ct. 1745 (1989); Lion Boulos v. Wilson, 834 F.2d 504, 509 (5th Cir. 1987); Velasquez v. Senko, 813 F.2d 1509, 1511 (9th Cir. 1987); Crawford-El v. Britton, 951 F.2d 1314 (D.C. Cir. 1991), *cert. den.* 113 S.Ct. 62 (1992).

In the first appeal in this case, the Seventh Circuit held that as matter of law Gordon Johnson knew or should have known that he could not use his police power to unreasonably deprive william Ross of his life, by prohibiting rescue attempts by qualified, albeit "nonofficial", personnel. The case was thus remanded for discovery and trial. The motion for summary judgment Johnson later filed proffers evidence on such matters as wave heights and water temperatures on August 11, 1985, the construction of the breakwater, the relative qualifications of Johnson, the civilian scuba divers, and other would-be rescuers, and the testimony of a "expert" as to what a hypothetical public safety diver would do in that situation -- all to show that Gordon Johnson acted reasonably in prohibiting all attempts to rescue William for a period of between 18 and 30 minutes, and, thus, in effectively condemning him to death by drowning.

Johnson's factual "showing" on these issues was countered by voluminous deposition testimony and other evidence proffered by the Plaintiffs, which showed that William Ross could have been safely rescued from the lake within a matter of seconds by any of several willing rescuers -- including lifeguards, firemen/paramedics and fully equipped and trained civilian scuba divers -- and, given the

frigid water in which he was found, likely would have both survived and recovered had such a rescue been allowed.

Clearly, this was a motion -- and an appeal -- that was doomed to fail. To the extent summary judgment would be based on the issue of law, the earlier decision of the Seventh Circuit that the law governing Johnson's conduct on August 11, 1985 was clearly established is the "law of the case" in this suit. To the extent summary judgment would depend on the absence of any material issues of fact, Johnson's motion was still an exercise in futility given the facts disclosed in discovery and disputed by Plaintiffs and Johnson in the motion.

Nor was there any jurisdiction for Johnson's interlocutory appeal to the Seventh Circuit under either scenario, as an appeal of issue governed by the law of the case is subject to dismissal for being frivolous, *see, e.g.* Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989), while an interlocutory appeal on factual issues is precluded by unanimous Circuit authority interpreting Mitchell v. Forsyth.

To put it bluntly, the number of contested issues of material fact which stand between Johnson and summary judgment on the issue of qualified immunity would preclude a Mitchell appeal in this matter regardless of whether it was Johnson's first, second, or fourth appeal. That fact alone constitutes a second, wholly independent basis for the dismissal of this interlocutory appeal, and dooms it regardless of any ruling obtained on any "successive appeals" issue. As this fact renders any opinion this court might

issue in this case largely advisory in nature, it is yet another reason why *certiorari* should be denied.

CONCLUSION

Although the eighth anniversary of William Ross' death will be observed shortly, his family still awaits a trial on its claims, while successive appeals filed by Johnson and other defendants glaciate their way through the Federal Court system. It was just this kind of "litigation by attrition" that caused the First, Seventh and Ninth Circuit Courts of Appeal to unequivocally limit the number of Mitchell appeals available to a given Defendant; it similarly now mandates that *certiorari* in this be case be denied, and this matter speedily returned to the district court for trial.

Johnson' posturing notwithstanding, this matter presents no threat to the integrity or viability of Mitchell v. Forsyth; Johnson here received all that he was entitled to receive under that doctrine -- a determination early in the litigation that the law governing his conduct the day William Ross died was indeed "clearly established", and that no immunity would lie. The evidence since adduced in discovery, much of which shows an even more egregious course of conduct by Petitioner, also dispositively proves the allegation of the Complaint -- thus rendering the genesis of this latest, fruitless appeal curious indeed.

This case, while of grave importance to the Ross family, is singularly (and tragically) unique in its facts, and presents no issue of general significance to public officials or §1983

litigants generally. Johnson should not be permitted to use this Court to further postpone a full trial in this matter under the guise of resolving some illusory "conflict" in the Circuits.

WHEREFORE, OLLIE BELLE and JESSE ROSS, Respondents herein, respectfully urge that the Petition for *certiorari* be denied.

OLLIE BELLE ROSS and JESSE ROSS,
Respondents

By: Kathryn Smith Matkov
One of Their Attorneys

GOULD & RATNER
Louis R. Hegeman
Kathryn Smith Matkov
222 North LaSalle Street
8th Floor
Chicago, Illinois 60601
(312) 236-3003

Supreme Court, U.S.
FILED
JUL 2 1993
OFFICE OF THE CLERK

No. 92-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LORRAINE JOHNSON, as Special Administratrix of the Estate of GORDON JOHNSON, Deceased,

Petitioner,

v.

JESSE ROSS, Representative of the Estate of WILLIAM ROSS, Deceased, and OLLIE BELLE ROSS, Individually,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

DANIEL PLAYFAIR FIELD
Counsel of Record
204 North West Street
Waukegan, Illinois 60085
(708) 662-5800
Attorney for Petitioner

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

BEST AVAILABLE COPY

13

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT:	
I.	
RESPONDENT HAS FAILED TO RESPOND TO THE ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI	1
II.	
RESPONDENT'S "QUESTION PRESENTED" DOES NOT ACCURATELY STATE THE CASE .	3
III.	
THE RECORD PRESENTS NO GENUINE DISPUTES OF MATERIAL FACTS SUFFICIENT TO PRECLUDE SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY ..	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. Creighton, 483 U.S. 635 (1987)	4, 5, 7
Anderson v. Liberty Lobby, 477 U.S. 242 (1986)	6
City of Seattle v. Bascomb, 507 U.S. ____, 113 S.Ct. 1837 (1993)	3
Collins v. City of Harker Heights, Texas, 503 U.S. ____, 112 S.Ct. 1061 (1992)	8
Daniels v. Williams, 474 U.S. 327 (1986)	8, 9
Davis v. Scherer, 468 U.S. 183 (1984)	4
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989)	2, 10
Graham v. Connor, 490 U.S. 386 (1989)	6
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	6, 7
Hunter v. Bryant, 502 U.S. ____, 112 S.Ct. 534 (1991)	4, 8
Malley v. Briggs, 475 U.S. 335 (1986)	3, 4
Mitchell v. Forsythe, 472 U.S. 511 (1985)	8
Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. ____, 113 S.Ct. 684 (1993)	5
Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985)	9
Siegert v. Gilley, 500 U.S. ____, 111 S.Ct. 1789 (1991)	8

No. 92-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LORRAINE JOHNSON, as Special Administratrix of the Estate of GORDON JOHNSON, Deceased,

Petitioner,

v.

JESSE ROSS, Representative of the Estate of WILLIAM ROSS, Deceased, and OLLIE BELLE ROSS, Individually,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

I.

RESPONDENT HAS FAILED TO RESPOND TO THE ISSUES RAISED IN THE PETITION FOR A WRIT OF CERTIORARI.

In his Brief in Opposition to the Petition for a Writ of Certiorari, the Respondent has not addressed the argument raised in the Petition that the rule invoked by the Seventh Circuit to dismiss this Appeal impermissibly restricts its jurisdiction in a fashion not authorized by congressional action or the decisional law of this Court. Nor

does he cite authority to refute the contention that several other circuits consider their appellate jurisdiction over pretrial appeals of Orders denying immunity in civil rights cases as a matter of law to be much broader than does the Seventh Circuit. This conflict in the circuits thus remains.

Nor does he respond to Petitioner's argument that the extent, if any, to which public officials who respond to scenes such as that which confronted Johnson may weigh the competing interests of those in need of rescue and the well being of persons who, perhaps unwisely, volunteer to enter those perilous situations is unsettled but nonetheless an important and recurrent question confronting state and local governments and thus a proper basis upon which to grant certiorari, see, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 194 (1989).

Respondent's Brief in Opposition rather, misperceives the posture of this case in its "question presented" and then concentrates on two arguments which cannot be reconciled with one another.

The first of these is that the facts on the fully developed record are precisely as set forth by the Court of Appeals in its summary of the allegations of his Complaint in the first appeal. He thus reasons that Petitioner is precluded under the doctrine of law of the case from even pleading the defense of qualified immunity.

His Brief then assumes an internal inconsistency by arguing that a grant by this Court of a Writ of Certiorari would ultimately prove improvident since the immunity issue is so bound up with factual disputes that it cannot be resolved without a trial. The strength of this argument has been cast in some doubt by recent action of this

Court, see, *City of Seattle v. Bascomb*, 507 U.S. ____, 113 S.Ct. 1837 (1993).

Logic dictates that both of these arguments cannot be correct. Substantive law and the record of this case dictate that neither is correct.

II.

RESPONDENT'S "QUESTION PRESENTED" DOES NOT ACCURATELY STATE THE CASE.

The question Respondent presents to this Court on the first page of his Brief in Opposition does not correctly state the circumstances of this case. Respondent questions whether Defendant should be allowed to file multiple pretrial appeals on the "same issue" of qualified immunity. However, this case does not involve multiple appeals by a Defendant since this is the first and, therefore, only appeal which Petitioner has filed.

Respondent is also incorrect to state that this appeal invokes the same issue as the earlier appeal prosecuted by the Respondent. The issue then was whether Respondent's Complaint and any favorable inferences to be drawn therefrom sufficiently alleged a violation of clearly established law.

However, the issue on which Petitioner sought review in this appeal is whether or not, within the factual contours of this case as borne out through discovery, all reasonable officers with Johnson's training in possession of that information which Johnson was aware and confronting the situation that Johnson faced would have known that by acting as Johnson did they would be depriving Respondent's decedent of rights secured to him by the Constitution. Unless this question can be answered in the affirmative, Johnson is immune from suit, *Malley*

v. Briggs, 475 U.S. 335, 341 (1986); *Hunter v. Bryant*, 502 U.S. ____, 112 S.Ct. 534, 537 (1991). Respondent bears the burden of proving that answer, *Davis v. Scherer*, 468 U.S. 183, 197 (1984).

Respondent also, in an attempt to minimize the national importance of the questions raised in this case, argues that Petitioner should not be allowed a pretrial appeal since the issue of qualified immunity "turns on the numerous factual questions germane solely to this case . . .". This ignores the fact that qualified immunity must always be determined within the factual contours of the particular case, *Anderson v. Creighton*, 483 U.S. 635, 639-642 (1987). Nor, for reasons which will be discussed below, are there unresolved factual disputes requiring a trial which are relevant to the immunity question.

III.

THE RECORD PRESENTS NO GENUINE DISPUTES OF MATERIAL FACTS SUFFICIENT TO PRECLUDE SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY.

The District Court denied Petitioner's Motion for Summary Judgment on qualified immunity summarily and solely as a matter of law (App. to Pet. for Cert. A-33).

The Court of Appeals also dismissed Petitioner's appeal solely as a matter of law by invoking what to that point had been an unarticulated rule in the circuit that Johnson could not maintain a pretrial appeal on the issue of immunity because the Plaintiff had previously prosecuted an Appeal of a final judgment adverse to her on that issue (App. to Pet. for Cert. A-1, A-34, 35).

Neither Court based its ruling on any unresolved factual issues in the record before it.

Respondent purports to raise factual issues such as the water temperature where Ross was recovered, the speed of the recovery made by the public safety diver and the fact that Ross, though never regaining consciousness, did not die until several hours after recovery from the lake. She also argues that due to the claimed coolness of the water that Ross would have lived if Johnson had not acted (Brief in Opposition, pp. 12-13). Initially, Petitioner notes that there was absolutely no mention of the water temperature where Ross was found or of any purportedly life extending properties of cold water in the materials presented to the District Court by the parties on Johnson's Motion for Summary Judgment. Yet, no harm is done since these matters are not relevant to this claim for it is undisputed that none of them were known to Johnson when he acted. They are, therefore, not material to a qualified immunity determination.

Nor is consideration of these facts necessary to answer the purely legal question of whether or not it was clearly established on August 11, 1985 that a public officer responding to the scene where an individual had been submerged for a time which was longer than his training taught him was survivable could restrain volunteer rescuers in favor of trained public safety divers he knew were coming out of concern for the safety of the would-be volunteers, see, *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. ____, ____, 113 S.Ct. 684, 689 (1993).

A claim of qualified immunity requires examination of the information possessed by the Defendant at the time he acted, *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

Respondent's claim that factual disputes preclude consideration of Johnson's immunity as a matter of law fails to consider that such disputes will require a trial only when they create *genuine* issues of *material* fact (em-

phasis in original), *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Those factual disputes which Respondent attempts to identify in this case do not address information known by Johnson at the scene and, therefore, are not material to the issue of qualified immunity rendering them irrelevant and unnecessary to consideration of that issue, *id.*

Also, Respondent's reliance on events which either occurred after Johnson acted or of which he was not aware when he acted is unpersuasive since the objective reasonableness of Johnson's conduct must be judged from the prospective of a reasonable officer in possession of that information which Johnson knew at the time he acted and in light of the circumstances which he confronted rather than from the 20/20 vision of hindsight, *Graham v. Connor*, 490 U.S. 386, 396-398 (1989). Whether or not a reasonable officer could have believed Johnson's conduct to be lawful must also allow for the fact that he was called upon to act in circumstances which were tense, uncertain and rapidly evolving, *id.*

While *Graham* was decided in the Fourth Amendment context, the analysis there is the same as in a case of qualified immunity. In each the test is of objective reasonableness, *Graham*, 490 U.S. at 398; *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

Respondent claims that Johnson engaged in "after the fact justification for preventing the rescue attempts" and that the facts upon which Petitioner relies to establish that defense are "highly contested" (Respondent's brief in opposition page 6). Yet the record is clear and uncontested regarding what Johnson knew and observed at the time he acted. That he had been trained that a person would die in five minutes of submersion, that Ross had been under as long as thirteen minutes by the time he arrived at the scene,

that he knew public safety divers were on the way, that those divers arrived at the breakwater within less than two minutes of Johnson's arrival at the scene, that Ross could not be seen in the water, that Johnson himself was a member of a fire department dive team as well as a public safety diving organization which stressed that for safety reasons no individual who was not trained in the dangers of rescue and recovery diving should be allowed to participate in recovery dives is all undisputed.

What Respondent is really contesting is Johnson's intent or his actual motive at the time he acted. Yet since *Harlow* was decided, questions of intent are irrelevant to an analysis of the "objective reasonableness" of a Defendant's actions. Whatever Respondent might claim Johnson's subjective belief to have been at the time is irrelevant, *Anderson*, 483 U.S. at 642.

Respondent agreed in the District Court that the facts in the second preceding paragraph were true but contested the conclusion that those factors provided the motivation for Johnson's acts. His argument misses the mark however, since even if it were true as Respondent contends, that Johnson's actual intent was not so benign, he would still be entitled to immunity if another reasonable officer possessed of that knowledge would have thought Johnson's conduct was lawful. Respondent's argument that the facts are in dispute is an attempt to reintroduce a subjective component which *Harlow* removed from the qualified immunity defense, see, 457 U.S. at 815-820. While the issue of Johnson's intent might be relevant to the ultimate question of the merits of Plaintiff's claim that Johnson deprived Ross of due process, it is not relevant, and is expressly excluded by *Harlow*, from the purely legal question of whether the legal norms allegedly violated by Johnson were clearly established at the time of

his challenged actions, *Mitchell v. Forsythe*, 472 U.S. 511, 527-530 (1985).

The unstated thrust of Respondent's argument is that he feels that the question of whether or not Johnson's conduct was reasonable should be resolved by a jury. Such a claim, however, is in direct conflict with this Court's determination that it is for the Court, not a jury, to decide whether Johnson acted reasonably under settled law in the circumstances and not whether another reasonable, or more reasonable, interpretation of the events can be constructed years after the fact, *Hunter*, 502 U.S. at ____, 112 S.Ct. at 537.

All of which leads to another question. Has Respondent even stated a due process violation in the first instance? See, *Siegert v. Gilley*, 500 U.S. ____, ____, 111 S.Ct. 1780, 1793 (1991). Due process claims require that the state action said to have caused the deprivation be arbitrary since the due process clause of the Fourteenth Amendment is not implicated by a governmental official who causes an unintentional injury, *Daniels v. Williams*, 474 U.S. 327, 332 (1986). Historically, the guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty or property, *Collins v. City of Harker Heights, Texas*, 503 U.S. ____, ____ n.10, 112 S.Ct. 1061, 1069 n.10 (1992).

Petitioner submits that Johnson's conduct was not arbitrary or conscious shocking in the constitutional sense. This Court has unanimously held that the provision of governmental services is based on a rational decision making process which must take into account competing interests, 503 U.S. at ____, 112 S.Ct. at 1070. In this case, those interests included the remote probability of Ross being retrieved from the lake alive and the real danger perceived by Johnson of death or injury to the volunteers

at the end of the breakwater and the two sport divers who arrived in their boat. Each of those interests are worthy of governmental consideration yet it is not clearly established at what point one is predominate over the other.

This Court is reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this uncharted area are scarce and open ended, *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985).

Respondent has never contended that Johnson intended that Ross die. This Court has not held (and thus it could not be clearly established) that any mental state less culpable than intent will implicate the due process clause, *Daniels*, 474 U.S. at 334 n.3.

Relying on dicta from its earlier decisions, the Court of Appeals found that the well pled allegations of Plaintiff's Complaint and all favorable inferences derived therefrom could support the conclusion that Johnson's conduct was reckless, while at the same time recognizing that "there is no suggestion in the Complaint that Johnson maliciously desired the boy to die" (App. to Pet. for Cert. A-29). The Court also found that it was clearly established on the date of the incident that "a citizen in peril for his life had a constitutional right that prevented a police officer from cutting off private avenues of life saving rescue without providing an alternative" (App. to Pet. for Cert., A-27-28). This conclusion, however, implies that by acting as he did Johnson created a "special relationship" between himself and William Ross.

The ruling of the Seventh Circuit however, extends beyond those circumstances where such special relationships have been recognized by this Court. This Court has

only found such relationships which create a duty of protection when it has been the state which forcibly took the individual into its custody and completely restrained that individual's liberty, *DeShaney*, 489 U.S. 198-99. At no point did Johnson deprive William Ross of his freedom to act. The constitutional right which the Seventh Circuit found to exist in its earlier opinion in this case is broader than any theretofore recognized and in fact parallels the dissent in *DeShaney* which maintained that the state cannot cut off private sources of aid and then refuse aid itself, 489 U.S. at 207 (Brennan, J., dissenting).

William Ross was killed by Lake Michigan and not by Gordon Johnson. Neither Johnson nor any other state actor had any role in placing Ross in his position of peril. Nor did Johnson intend that Ross die. Ross' death, therefore, is not the result of intentional conduct which implicates his due process rights under the Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals to the Seventh Circuit should be granted.

Respectfully submitted,

DANIEL PLAYFAIR FIELD
Counsel of Record
204 North West Street
Waukegan, Illinois 60085
(708) 662-5800
Attorney for Petitioner